Supreme Court, U.S.
FILED

No. ___ 041033 JAN 31 2005

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

PETITION FOR A WRIT OF CERTIORARI

MARSHA J. MACBRIDE
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

DONALD B. VERRILLI, JR.*
IAN HEATH GERSHENGORN
ELAINE J. GOLDENBERG
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* *Counsel of Record*

January 31, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission's changes in the local radio ownership rules, leading to a substantial reduction in the number of local radio stations that may be commonly owned and transferred, violates Section 202 of the Telecommunications Act of 1996 by administratively repealing Congress's decision to dramatically deregulate media ownership rules and expand permissible common ownership.

2. Whether the Federal Communications Commission violated Section 202 of the Telecommunications Act of 1996 when it retained severe restrictions on local television ownership in all markets in the face of overwhelming evidence, acknowledged by the Commission, that common ownership in small and mid-sized local television markets will improve competition and advance the public interest.

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies the parties to the proceeding in the court whose judgment is sought to be reviewed.

The petitioners below were Prometheus Radio Project, Media General, Inc., National Association of Broadcasters, Network Affiliated Stations Alliance, ABC Television Affiliates Association, CBS Television Affiliates Association and NBC Television Affiliates, Fox Entertainment Group, Inc. and Fox Television Stations, Inc., Viacom Inc., National Broadcasting Company, Inc., Telemundo Communications Group, Inc., Sinclair Broadcast Group, Inc., Media Alliance, Paxson Communications Corporation, National Council of the Churches of Christ in the United States, Tribune Company, Emmis Communications Corporation, Center for Digital Democracy and Fairness & Accuracy in Reporting, Clear Channel Communications, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, PRLDEF-Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., and Women's Institute for Freedom of the Press.

The respondents below were the Federal Communications Commission and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states that the National Association of Broadcasters has no parent company and issues no stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT iii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 1

STATUTES INVOLVED 1

STATEMENT OF THE CASE 1

REASONS FOR GRANTING THE PETITION 15

I. This Case Raises Critically Important Questions About The FCC's Disregard Of Congressional Commands In The 1996 Act As To The Ownership Of Local Radio And Local Television Stations. 15

II. The Local Radio Market Redefinition Upheld By The Third Circuit Violates Section 202 Of The 1996 Act And Contravenes Congress's Deregulatory Intent. 19

III. The "Top-4" Restriction On Local Television Ownership Upheld By The Third Circuit Likewise Violates Section 202 Of The 1996 Act. 26

CONCLUSION 30

APPENDIX*

Appendix A

Statutory Provisions Involved 1a

* As indicated in footnote 1 of this petition, *see infra*, in order to minimize the burdens on the Court and the parties, petitioner National Association of Broadcasters requested and received permission from the Supreme Court Clerk's office to cite to the appendix being filed in this case by petitioner Media General, Inc. Unless citation to the "NAB Pet. App." is specifically indicated, all appendix cites in the petition are to the Media General appendix.

TABLE OF AUTHORITIES

CASES

ACLU v. FCC, 823 F.2d 1554 (D.C. Cir. 1987) 25

AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999) 16

CBS, Inc. v. FCC, 453 U.S. 367 (1981) 17

Cellco Partnership v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 23

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1986) 19

Commodity Futures Trading Commission v. Schor, 478 U.S. 833 (1986) 20

Connecticut National Bank v. Germain, 503 U.S. 249 (1992) 25

FCC v. Allentown Broadcasting Corp., 349 U.S. 358 (1955) 17

FCC v. National Citizens Committee for Broadcasting, 436 U.S. 775 (1978) 16

FCC v. Sanders Brothers Radio Station, 309 U.S. 470 (1940) 17

FCC v. WNCN Listeners Guild, 450 U.S. 582 (1981) 17

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 22

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir. 2002), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) 12, 22, 24

HBO, Inc. v. FCC, 567 F.2d 9 (D.C. Cir. 1977) 25

Hohn v. United States, 524 U.S. 236 (1998) 25

Lorillard v. Pons, 434 U.S. 575 (1978) 20

Metro Broadcasting, Inc. v. FCC, 497 U.S. 547 (1990) 17

Morales v. Trans World Airlines, Inc., 504 U.S. 374 (1992) 24

Reno v. ACLU, 521 U.S. 844 (1997) 2, 16

Reves v. Ernst & Young, 494 U.S. 56 (1990) 22

Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) ..... *passim*

Turner Broadcasting System, Inc. v. FCC, 520 U.S. 180 (1997) 18, 29

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) 17

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) 16

STATUTES AND REGULATIONS

28 U.S.C. § 2112(a) 12, 17

28 U.S.C. § 2342(1) 12, 17

47 U.S.C. § 154(i) 24

47 U.S.C. § 161 23

47 U.S.C. § 309(~~j~~)(14) 18

47 U.S.C. § 303(r) 24

47 U.S.C. § 336 18

47 U.S.C. § 337 18

47 U.S.C. § 402 24

47 C.F.R. § 73.3555(a) (1995) 4, 21

Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004) 3

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

Preamble 2

§ 202 ..... *passim*

§ 202(a) 3, 20, 24, 25

§ 202(b) ..... *passim*

§ 202(c) 3, 10, 24

§ 202(d) 3

§ 202(e) 3

§ 202(f) 3

§ 202(h) ..... *passim*

LEGISLATIVE MATERIALS

S. Rep. No. 104-23 (1995) 2

H.R. Rep. No. 104-204 (1995) 10, 14, 22

141 Cong. Rec. S8424 (daily ed. June 15, 1995) 20

ADMINISTRATIVE MATERIALS

FCC 2002 Biennial Regulations Review, 18 F.C.C.R. 4243 (2002) 23

In re 2000 Biennial Regulatory Review, 16 F.C.C.R. 1207 (2001) 23

FCC 1998 Biennial Regulations Review, 15 F.C.C.R. 11,058 (2000) 7

In re Definition of Radio Markets, 15 F.C.C.R. 25,077 (2000) 7, 8

In re Implementation of Sections 202(a) & 202(b)(1) of the Telecommunications Act of 1996, 11 F.C.C.R. 12,368 (1996) 6

In re Review of the Commission's Regulations Governing Attribution of Broadcast & Cable/MDS Interests, 14 F.C.C.R. 12,559 (1999) 14

In re Revision of Radio Rules & Policies, 7 F.C.C.R. 2755 (1992) 18

In re Revision of Radio Rules & Policies, 7 F.C.C.R. 6387 (1992) 5, 20

In re Revision of Radio Rules & Policies, 9 F.C.C.R. 7183 (1994) 5, 20

In re Rules & Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 16 F.C.C.R. 19,861 (2001) 4

57 Fed. Reg. 35,763-01 (1992) 4

57 Fed. Reg. 42,701-01 (1992) 4

MISCELLANEOUS

William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision,* 53 Am. U. L. Rev. 583 (2004) 15-16

Theresa J. Ottina, *The Declining Financial Position of Television Stations in Medium and Small Markets* (Dec. 2002) 26

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 373 F.3d 372, and is reprinted at Pet. App. 1a-193a.[1] The Order of the Federal Communications Commission is reported at 18 F.C.C.R. 13,620 (the "*Order*"), and is reprinted at Pet. App. 206a-723a.

JURISDICTION

The Court of Appeals entered its judgment on June 24, 2004 and decided petitions for rehearing on September 3, 2004. On November 22, 2004, Justice Souter extended the time to file petitions for certiorari to January 3, 2005. On December 22, 2004, Justice Souter further extended the time to file petitions to January 31, 2005. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

This case involves provisions of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56. The pertinent provisions are reproduced at NAB Pet. App. 1a-5a.

STATEMENT OF THE CASE

This petition raises fundamental questions about the Federal Communications Commission's disregard of the commands of Congress with respect to the ownership of local radio and television stations. In Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, § 202, 110 Stat. 56 ("1996 Act"), Congress directed the FCC to relax some of its restrictions on common ownership of

---

[1] In order to minimize the burdens on the Court and the parties, petitioner National Association of Broadcasters ("NAB") requested and received permission from the Supreme Court Clerk's office to cite to the appendix being filed in this case by petitioner Media General, Inc. Unless otherwise specifically indicated, all appendix cites in the petition are to the Media General appendix.

radio and television stations, and eliminate others altogether. Congress then mandated that the FCC continue this deregulatory agenda, ordering the FCC to review its media ownership regulations every two years and to "repeal or modify" those remaining regulations that were "no longer in the public interest." 1996 Act § 202(h).

Notwithstanding this directive from Congress, the United States Court of Appeals for the Third Circuit agreed with the FCC that Section 202 permits the FCC to adopt *more restrictive* rules for media ownership, even in the face of extensive findings confirming the significant benefits of common ownership. Indeed, in the Third Circuit's view, Section 202 provides no substantive constraint on the FCC's authority to limit common ownership, and the only function of Section 202(h) is to require the FCC "periodically to justify its existing regulations." Pet. App. 34a.

The Third Circuit's affirmance of the aspects of the FCC's *Order* challenged here cannot be squared with the deregulatory framework that Congress adopted in the 1996 Act, and will have severe consequences for local radio and television broadcasters. It is also in significant tension with decisions of the United States Court of Appeals for the District of Columbia Circuit. This Court's review is thus manifestly appropriate.

1. *The 1996 Act.* In the 1996 Act, Congress enacted a sea change in policy toward media ownership, choosing to place increased reliance on competition, rather than heavy-handed regulation, to promote the public interest. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 857-58 (1997) (explaining that the 1996 Act's "primary purpose was to reduce regulation" and thereby "promote competition in . . . the market for over-the-air broadcasting"); *see also, e.g.*, 1996 Act preamble; S. Rep. No. 104-23, at 1 (1995) (explaining that Congress intended to set up a "pro-competitive, de-regulatory, national policy framework"). Prior to the Act, the FCC had for

decades imposed restrictive regulations that sharply limited the number of media outlets – principally radio stations, television stations, and newspapers – that an entity could own in any local market, as well as the overall number of radio and television stations an entity could own nationwide.

The 1996 Act eliminated or relaxed virtually all of these media ownership rules. *See* 1996 Act § 202(a) (eliminating national radio station ownership cap); *id.* § 202(b) (relaxing local radio station ownership levels); *id.* § 202(c) (eliminating national television station ownership cap, increasing national audience reach limits, and ordering the Commission to take further action on local television ownership limits); *id.* § 202(d) (relaxing "one-to-a-market" cross-ownership rule); *id.* § 202(e) (relaxing dual television network ownership restrictions); *id.* § 202(f) (eliminating cable-broadcast cross-ownership restriction).

Section 202(h) was a critical part of Congress's effort to change the regulatory paradigm. In that provision, Congress directed the Commission to undertake a biennial review to determine, on an ongoing basis, whether to "repeal or modify" regulations still further in light of media competition. *Id.* § 202(h); *see also* Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) (amending Section 202(h) to require quadrennial rather than biennial review). In particular, Section 202(h) requires the Commission to "determine whether any of [its ownership rules] are necessary in the public interest in light of competition," and to "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h).

2. *Local radio rules.* In its 2002 biennial review, the Commission changed the way it defined local radio markets, and in so doing effectively reduced permissible common ownership of local radio stations below the levels set in the 1996 Act.

Historically, the FCC had sharply constrained the right of a single entity to own multiple radio stations, both nationally and within local markets. The Commission first limited local ownership of AM radio stations in the 1930s, and, after the development of FM, restricted common ownership to one AM station and one FM station in a single local market. *See In re Rules & Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets*, 16 F.C.C.R. 19,861, ¶¶ 3-11 (2001) ("*Multiple Ownership Order*"). This restriction remained in place until 1992, when the Commission relaxed it slightly, permitting common ownership of no more than three stations in local markets with fourteen stations or fewer, and no more than four stations in larger markets; in no event could more than two of the commonly owned stations be either AM or FM. *See* 47 C.F.R. § 73.3555(a) (1995).[2]

Because these ownership restrictions applied to local "radio markets," the method used for defining those markets effectively dictated the scope of the restriction. For decades, the Commission used a "contour" approach to define local radio markets based on listeners' ability to receive stations' signals. *See Multiple Ownership Order* ¶¶ 3-11. Local markets were defined with reference to stations' "principal community contour" – essentially, the area reached by a station's signal at a certain level of strength. *See* 47 C.F.R. § 73.3555(a)(3) (1995).[3] For each proposed combination of

---

[2] The description of the 1992 rule revision contained in the Third Circuit's opinion below is inaccurate; the numerical tiers that the Third Circuit sets forth were never put into effect. *See* Pet. App. 82a-83a n.60 (citing 57 Fed. Reg. at 18,090); 57 Fed. Reg. 35,763-01 (1992); 57 Fed. Reg. 42,701-01 (1992) (explaining that "[t]his Memorandum Opinion and Order modifies rules adopted in Report and Order in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992), 57 FR 18089 (April 29, 1992)").

[3] The Commission adopted the "principal community contour" approach in 1989, and had previously used a similar signal-based approach based

stations, the local market consisted of "the number of . . . stations whose principal community contours overlap, in whole or in part, with the principal community contours of the stations" that were proposed to be commonly owned. *Id.* In other words, a market consisted of stations whose signals reached the same listeners reached by one or more of the stations whose ownership was at issue.

The Commission reaffirmed this approach in 1992 and again in 1994. These orders rejected the notion that markets should be defined purely in terms of geography – *e.g.*, defining all of an urban area such as Philadelphia or Seattle as a local market regardless of the actual reach of the signals of radio stations based in those locales. *See In re Revision of Radio Rules & Policies*, 7 F.C.C.R. 6387, ¶¶ 39-40 (1992) ("*1992 Radio Order*"); *In re Revision of Radio Rules & Policies*, 9 F.C.C.R. 7183, ¶ 35 (1994) ("*1994 Radio Order*"). The Commission explained that a contour overlap approach provides "a more accurate measure of where a station's signal can be adequately received and, therefore, where [the station] can compete for listeners." *1994 Radio Order* ¶ 35.

It was against this backdrop that Congress passed the 1996 Act, which significantly relaxed the FCC's numerical limits on local radio ownership and permitted additional combinations in each "radio market." Under the Act, a party that could previously have owned no more than four stations in a large market could now own as many as eight. Specifically, Section 202(b) of the 1996 Act states that:

> The Commission shall revise section 73.3555(a) of its regulations . . . to provide that –
>
> (A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up

---

on the overlap of stations' "interference contours." *Order* ¶ 235 n.498 (Pet. App. 367a).

> to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);
>
> (B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);
>
> (C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not more than 4 of which are in the same service (AM or FM); and
>
> (D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

1996 Act § 202(b); *see also In re Implementation of Sections 202(a) & 202(b)(1) of the Telecommunications Act of 1996*, 11 F.C.C.R. 12,368, ¶¶ 4, 5 (1996) (revising the regulation per the statutory instruction). In putting these specific numerical limits into place, Congress did not change in any way – and, indeed, relied upon – the FCC's existing definition of "radio market," which was also set forth in 47 C.F.R. § 73.3555(a).

Congress did not make these limits immutable, but authorized changes under only two circumstances. First, the Commission may permit a person or entity to own *additional* radio broadcast stations "if the Commission determines that such ownership . . . will result in an increase in the number of radio broadcast stations in operation." 1996 Act § 202(b). Second, the Commission must scrutinize its ownership rules periodically as part of the review required by Section 202(h).

Expressing concern that the 1996 Act resulted in too much concentration, the FCC initiated a proceeding in 2000 to change the definition of local radio markets. *See In re Definition of Radio Markets*, 15 F.C.C.R. 25,077, ¶¶ 5-7 (2000); *id.* at 25,097-98 (separate statement of Commissioner Gloria Tristani); *In re 1998 Biennial Regulatory Review*, 15 F.C.C.R. 11,058, 11,087-91 (2000). The Commission thus threatened to do indirectly what it could not do directly – to limit common ownership in local radio markets to levels below those set by Congress. Indeed, at the time, individual Commissioners warned that the FCC was seeking "to change our definition of 'markets' in order to cut back on the concentration levels that Congress expressly set." 15 F.C.C.R. at 25,099 (separate statement of Commissioner Furchtgott-Roth); *accord id.* at 25,100 (separate statement of Commissioner Powell).

In the *Order* under review here, the FCC ignored that warning. The Commission acknowledged that radio stations had previously suffered serious financial difficulties, due in large part to their "inability . . . to seek efficiencies through consolidation." *Order* ¶¶ 292-293 (Pet. App. 406a-407a). It also recognized that the increased common ownership resulting from Congress's relaxation of the ownership rules put the "radio industry . . . on a stronger financial footing" and created "financial stability," enabling stations to better serve their listeners. *Id.* ¶¶ 235-236, 292-293 (Pet. App. 367a-368a, 406a-407a). The Commission nevertheless abandoned the longstanding contour-based approach that had defined "radio market[s]" when Congress used the phrase in Section 202(b) of the 1996 Act, and adopted instead a more restrictive, geography-based market definition.

The Commission's new market definition relies entirely on data provided by Arbitron, a commercial ratings service that for some areas of the country assembles survey data on radio listenership and groups stations geographically. *See,*

e.g., *id.* ¶¶ 275-276 (Pet. App. 391a-393a). Under Arbitron's approach, stations that do not compete for listeners, because their signal contours do not overlap, are often placed within the same geographic market.[4]

It is undisputed that the Commission's new approach to market definition results in the inclusion of fewer stations in a market, which in turn results in stricter ownership limits than Congress contemplated in Section 202 of the 1996 Act. *See, e.g.*, Pet. App. 148a-149a; *see also Order* ¶¶ 483, 486 ("We recognize that a geographic based radio market definition may result in a fewer number of stations in certain markets.") (Pet. App. 539a, 541a-542a); *Radio Markets Definition*, 15 F.C.C.R. at 25,100 (concurring statement of Commissioner Powell); Br. of FCC at 20 (3d Cir. filed Dec. 9, 2003) (conceding that the *Order* "tightened existing rules" in the local radio context).

The Commission exacerbated the impact of its market redefinition by applying it to existing station combinations, not merely future ones. The Commission grandfathered existing groups of commonly owned radio stations that would otherwise exceed the ownership limits in light of the newly defined markets but only so long as those groups did not change hands. *Order* ¶ 484 (Pet. App. 539a-541a). Such

---

[4] An Arbitron "Metro" market consists of a particular county or set of counties with a boundary determined by Arbitron. As redefined by the Commission, a local radio market in an area rated by Arbitron now includes commercial and non-commercial stations that are licensed to a community within the relevant "Metro." Under the FCC's revised rules, a local radio market also includes stations located outside the Metro that attract a minimum level of listenership in the Metro and elect to be designated as "home" to the Metro. *See id.* ¶¶ 275, 277 & n.582, 279-281, 295 (Pet. App. 391a-398a, 408a-409a).

The FCC initiated a new proceeding to consider how to treat the areas not rated by Arbitron and elected in the interim to use a slightly modified version of the signal contour approach for those areas. *See id.* ¶¶ 282-286 (Pet. App. 398a-401a).

grandfathered groups of stations must be broken up to comply with the new ownership limits if they are sold or transferred. *Id.* ¶ 487 (Pet. App. 542a-544a).

Of a similar effect is the Commission's decision to count radio stations with Joint Sales Agreements ("JSAs"), which involve the joint sale of some advertising time, toward the number of stations the brokering licensee may own in a local market. *Id.* ¶¶ 316-325 (Pet. App. 422a-429a). Attribution of JSAs does not shrink the number of stations counted in a market, but it can increase the number of stations that a particular party is deemed to own, thus limiting the party's right to acquire additional stations under the applicable ownership limits.

The Commission asserted that all these new restrictions on local radio market combinations comported with Section 202. The Commission stated that "Section 202(b) contemplated that we would exercise our rulemaking authority to make revisions to the rule that Congress required," because even if "Congress intended Section 202(b) as a statement of the radio station ownership levels that would be conclusively consistent with the public interest," Congress did not "intend[] that statement to remain true in perpetuity." *Id.* ¶¶ 265-267 (Pet. App. 385a-387a). The Commission also concluded that its actions were consistent with Section 202(h). In the FCC's view, Section 202(h) simply "shift[s] the traditional administrative law burden from those seeking to modify or eliminate the rule to those seeking to retain it," *id.* ¶ 269 (Pet. App. 387a-388a), but does not (either alone or in conjunction with the rest of Section 202) limit "the types of changes that [the agency] may conclude are in the public interest," *id.*

3. *Local television rules.* The Commission's *Order* also modified the FCC's local television ownership rules. In 1964, the Commission adopted a "TV Duopoly Rule" that prohibited common ownership or control of local television

stations with overlapping signal contours. In subsequent decades, however, dramatic market changes eroded the competitive and financial position of local television broadcasters. Thus, in the 1996 Act, Congress directed the FCC to "conduct a rulemaking proceeding to determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control . . . within the same television market." 1996 Act § 202(c); *see also id.* (eliminating nationwide cap on common ownership of television stations and increasing national audience reach limit); H.R. Rep. No. 104-204 at 118 (1995) ("H. Rep.") (explaining that competitive changes in local markets "require substantial deregulation of the local television ownership rules" and that "[p]ermitting common ownership of stations will promote the public interest"). The FCC's local television rules were also made subject to review under § 202(h). *See supra* page 3.

Despite Congress's directives, the Commission in 1999 only slightly loosened the TV Duopoly Rule, *see Order* ¶ 132 (Pet. App. 389a), permitting common ownership of two television stations in the same local market where one of the stations was not among the four highest ranked stations in the market and "eight independently owned and operating full-power broadcast . . . television stations" remained in the market post-merger. *Id.* After review, the D.C. Circuit remanded this rule, explaining that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules" and was "designed to continue the process of deregulation." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002) (internal quotation marks omitted). In particular, the D.C. Circuit concluded that the Commission had failed to account for actual conditions in local markets because it had ignored the impact of cable and other media. *See id.* at 162-65.

On remand, the FCC undertook a detailed examination of local markets, and found that local television broadcasters "face intense competitive pressure from alternative video programming" such as cable and direct broadcast satellite. *Order* ¶ 125 (Pet. App. 286a). The Commission also found that increased competition, as well as the costs of a congressionally mandated transition to digital television, had placed severe financial pressures on broadcasters, particularly in small and medium-sized markets. *See id.* ¶ 201 (explaining that "data confirm that the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets") (Pet. App. 344a).

Based on this record, the Commission concluded that co-ownership of these beleaguered stations would ease financial burdens and result in substantial benefits to viewers. The Commission found that "common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings," *id.* ¶ 147 (Pet. App. 300a-301a); that the existing rule "restrict[ed] many broadcasters to suboptimal size and, therefore, hinder[ed] their ability to compete with other media for advertising revenue," *id.* ¶ 151 (Pet. App. 303a); that common ownership generally "improved audience ratings" since viewers generally "prefer the post-merger programming," *id.* ¶ 150 (Pet. App. 302a-303a); that common ownership enables stations to increase local and public affairs programming, *id.* ¶ 164 (Pet. App. 316a); and that there is "a positive correlation between same-market combinations and the offering of local news," *id.* ¶ 169 (Pet. App. 320a).

In light of these well-supported findings, the Commission modestly relaxed the local television ownership rules. Under the *Order*, two stations may be commonly owned in markets with 17 or fewer stations; in markets with

18 or more stations, common ownership of up to three stations is permitted. *See id.* ¶ 134 (Pet. App. 290a-291a).

But the Commission also adopted a rule that negated most of the deregulatory benefits of these changes. Specifically, the Commission prohibited common ownership of two stations ranked among the top 4 in audience share in any local market. Thus, despite expressly finding that "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets," *id.* ¶ 201 (Pet. App. 343a-344a), the FCC adopted a rule that, in the 150 smallest markets (of the 210 markets nationwide), allows no combinations at all in 81 markets, and only one combination in 35 more. The Commission recognized that its "top-4 rule" thereby "disserve[s] the public interest by preventing marginal – but not yet 'failing' – stations from effectively serving the needs of their communities." *Id.* ¶ 227 (Pet. App. 362a-363a). The Commission's only solution was to state that it would consider applications to waive the top-4 rule on a case-by-case basis. *See id.* ¶¶ 227-230 (Pet. App. 362a-365a).

4. *Proceedings in the Third Circuit.* Judicial review of the *Order* was assigned by lottery to the Third Circuit. *See* 28 U.S.C. § 2112(a); *see also id.* § 2342(1) (giving "exclusive jurisdiction . . . to determine the validity" of FCC orders to the federal courts of appeals on direct review). The Third Circuit first stayed implementation of the *Order*, *see* Pet. App. 194a-196a, and then (over a dissent by Chief Judge Scirica) denied a motion to transfer venue to the D.C. Circuit, which had previously remanded the local and national television ownership rules for the reconsideration that the Commission ultimately carried out in the *Order*. *See id.* at 197a-205a; *see also Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair Broad. Group Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002).

On June 24, 2004, the Third Circuit issued its decision on the merits. The court interpreted Section 202(h) to give the Commission wide discretion in carrying out its review of the ownership rules. In particular, despite acknowledging that Section 202(h) was intended to be "deregulatory," the court of appeals drained that term of all meaning. In the Third Circuit's view, Section 202(h) simply requires the Commission to "justify its existing regulations," so that a "regulation deemed useful when promulgated must remain so," and "[i]f not, . . . must be vacated or modified." Pet. App. 34a. The Third Circuit thus rejected arguments that Section 202(h) – read in light of Section 202 as a whole – put any "thumb on the scale" in favor of deregulation, and held that Congress did not "intend[] to restrict the Commission's rulemaking authority." *Id.* at 34a n.18. In the Third Circuit's view, other than the obligation for periodic justification, the Commission retained full flexibility to impose new, more stringent media ownership regulations – including the power to restore the restrictions Congress had expressly overturned – so long as the Commission believed that such regulations were reasonable. *See id.* at 34a.

In light of this interpretation, the Third Circuit upheld the aspects of the Commission's local radio and local television rules that are the subject of this petition. With respect to local radio, the court recognized that "the change to Arbitron Metro markets operates as a net decrease in most markets' size," *id.* at 91a, and therefore as a reduction in the number of radio stations permitted to be commonly owned. The court of appeals held, however, that under Section 202 "[t]he Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis," and it concluded that "[t]he change to Arbitron Metro markets is both." *Id.* at 85a.

The court rejected NAB's argument that Congress's express directive in Section 202(b) for the Commission to set

specific ownership levels for "radio markets" of particular size, in conjunction with Section 202(h)'s deregulatory mandate, precluded the Commission from effectively reducing the levels of common ownership below those set by Congress. The Third Circuit found it sufficient that the Commission reasonably concluded that the Arbitron methodology was preferable to a contour-based methodology (despite the fact that the Commission had twice in the four years prior to the 1996 Act expressly rejected that very conclusion). The court likewise upheld the Commission's decision to attribute JSAs, *see supra* page 9, even though this decision represented a change in course and was contrary to congressional intent, concluding that the decision was reasoned and did not raise constitutional problems. *See* Pet. App. 96a-98a; *see also* H. Rep. at 118 (stating that legislation did not change FCC's method of "attributing ownership" and did not "envision" the FCC doing so); *In re Review of the Commission's Regulations Governing Attribution of Broadcast & Cable/MDS Interests*, 14 F.C.C.R. 12,559 (1999) (specifically declining to require attribution of JSAs).

The Third Circuit employed a similar analysis to uphold the Commission's decision not to grandfather existing radio station combinations if they were sold. The court approved of the requirement to break up certain station groups when sold, despite the fact that it was concededly not deregulatory, finding it rational. *See* Pet. App. 91a-93a.

With respect to local television, the court upheld the restriction on combinations among top-4 stations. The court agreed that there was ample evidence of the benefits of common ownership for local television stations and their viewers, including "improved local news and public interest programming." *Id.* at 71a. Giving no substantive effect to Section 202(h), however, the court concluded that the Commission's top-4 local television rule, adopted on remand from the D.C. Circuit, was permissible. The court stated that

"the Commission's local television rule" is not unreasonable given that "the detriment of concentrated market power" might outweigh the "efficiency benefits" of consolidation. *Id.* at 73a-74a. The court also decided to "extend deference" to the Commission's "restriction on combinations among the top-four stations as opposed to the top-three or some other number." *Id.* at 75a.

The Third Circuit initially continued its stay of the Commission's rules pending the Commission's further action on the aspects of the *Order* that the court remanded. *See id.* at 107a. However, in response to the FCC's petition for rehearing, the court lifted its stay as to the implementation of the changes to the local radio rules that the court had approved. *See id.* at 193a. Accordingly, these changes have now gone into effect.

REASONS FOR GRANTING THE PETITION

In this case, the Third Circuit endorsed the FCC's decision to re-regulate local radio markets to levels that Congress found too restrictive in 1996, and to deny the undisputed benefits of deregulation and common ownership to local television broadcasters in small and medium-sized markets. This Court should grant review because the FCC has refused to implement the clear commands set forth in Section 202 of the 1996 Act, the FCC's actions will undeniably harm the vitally important local broadcast industry, and the Third Circuit's decision upholding the FCC is in significant tension with the D.C. Circuit's interpretation of Section 202.

I. This Case Raises Critically Important Questions About The FCC's Disregard Of Congressional Commands In The 1996 Act As To The Ownership Of Local Radio And Local Television Stations.

The Commission's review of its media ownership rules is "one of the most important [determinations] in the FCC's

history." William Fishman, *Comments on the FCC's Recent Mass Media Ownership Decision*, 53 Am. U. L. Rev. 583, 583 (2004). As part of this review, the Commission adopted a restrictive change in the definition of local radio markets and a "top-4" limitation on the common ownership of local television stations. These rules, upheld by the Third Circuit, involve one of the FCC's key regulatory missions and are undeniably of national concern. They also dramatically affect the financial future of local broadcasters and, indeed, the future development of local broadcasting itself.

This Court has recognized that the 1996 Act was "an unusually important legislative enactment," *Reno v. ACLU*, 521 U.S. at 857, and has previously decided a number of questions arising out of the FCC's implementation of the Act. *See, e.g., AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (reversing a decision of the Eighth Circuit with respect to the 1996 Act that would have interfered with the Act's goal of increasing competition); *Verizon Communications, Inc. v. FCC*, 535 U.S. 467 (2002) (interpreting the 1996 Act's provisions regarding telecommunications rate-setting methodology).

The questions presented here are of similar importance. Like the telecommunications provisions of the 1996 Act, the media ownership provisions govern the management of valuable spectrum and "profoundly affect[] a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.*, 525 U.S. at 397; *see also* Pet. App. 150a (noting that "[i]n each of the last six years, about 20% of U.S. radio stations have changed hands"). Each year, radio and television broadcast stations earn approximately $40 billion in local advertising revenue.

Moreover, in recognition of the importance of properly construing FCC authority in this area, this Court has frequently granted certiorari to review cases involving the FCC's media regulations – including its ownership rules –

even in the absence of a Circuit split. *See, e.g., FCC v. National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) (granting certiorari to review FCC regulations governing permissibility of common ownership of radio or television broadcast station and daily newspaper); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956) (granting certiorari to review FCC's multiple ownership rules for broadcast stations); *see also, e.g., Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990) (granting certiorari to review FCC policies encouraging minority ownership of broadcast stations); *CBS, Inc. v. FCC*, 453 U.S. 367, 371 (1981) (granting certiorari "to consider whether the Federal Communications Commission properly construed" a statute governing broadcast rules); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981) (granting certiorari to review FCC policy statement regarding public interest in competition among broadcasters); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 360 (1955) (granting certiorari on question relating to radio stations "[i]n view of the importance to the administration of the [Communications] Act"); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940) (same).

Because the Third Circuit was selected to review all challenges to the FCC's revised media ownership rules, *see* 28 U.S.C. § 2112(a), its decision has nationwide effect. *See id.* § 2342(1). If, as the Third Circuit has held, the FCC may construe Section 202 to permit an increase in the regulatory burdens on local radio and local television stations, then the 1996 Act's reform of the local ownership rules will be severely compromised. Further, the many beneficial effects of common ownership – which Congress instructed the Commission to attain – will not be realized.

The impact on local broadcasters is harsh. As the FCC itself conceded, "[a]s a result of th[e] consolidation [provided by the 1996 Act], the radio industry today is on a stronger financial footing than it was a decade ago." *Order* ¶ 236

(Pet. App. 368a); *see also id.* ¶¶ 235-236, 292-293 (Pet. App. 367a-369a, 406a-407a). By approving the FCC's cut-back of the very deregulatory measures that permitted this financial recovery, the Third Circuit's decision threatens to undo that progress. As the Commission has previously explained, the radio "industry's ability to function in the 'public interest, convenience, and necessity' is fundamentally premised on its economic viability." *In re Revision of Radio Rules & Policies*, 7 F.C.C.R. 2755, ¶¶ 2, 7-11 (1992). The FCC's market redefinition (and other rule changes) restricts the ability of struggling stations to attain the efficiencies of common ownership. Further, the FCC's tightening of ownership restrictions on local radio puts radio broadcasters at a competitive disadvantage with respect to all other electronic and print media with which they compete for advertising revenue and audience share.

Moreover, although the FCC conceded that local television broadcasters in small and medium-sized markets face severe financial pressures and that these pressures are eased by joint ownership, the new rules prevent the common ownership that offers these local broadcasters the hope of fiscal stability. Rules preventing local stations from forming more efficient ownership patterns consequently jeopardize the ability of stations to transition successfully to digital broadcasting, an important national policy. *See* 47 U.S.C. §§ 309(j)(14), 336, 337. The new rules will also seriously affect television viewers, who receive benefits from common ownership – including more local news, other local information, and improved programming overall – via the airwaves. *See* Pet. App. 71a (holding that common ownership has major advantages such as "improved local news and public interest programming"); *Order* ¶ 150 (Pet. App. 302a-303a) (concluding based on empirical study of existing local station combinations that permitting further common ownership would "likely result in the delivery of programming preferred by viewers"); *see also, e.g., Turner*

Broad. Sys., Inc. v. FCC, 520 U.S. 180, 189-90 (1997) (recognizing importance of "preserving the benefits of free, over-the-air local broadcast television").

The Third Circuit's affirmance of the Commission's local radio and television ownership rules will therefore have profound implications for the nature and quality of news, local affairs, and other programming offered to the listening and viewing public, as well as for the very survival of radio and television broadcasters across the country. The questions presented here are thus worthy of review in this Court.

II. The Local Radio Market Redefinition Upheld By The Third Circuit Violates Section 202 Of The 1996 Act And Contravenes Congress's Deregulatory Intent.

In affirming the FCC's replacement of the longstanding contour approach to local radio market definition with a geographic approach, as well as the Commission's refusal to grandfather under all circumstances existing combinations that run afoul of the new market definition, the Third Circuit permitted the FCC to tighten the limits on local station ownership established by Congress in the 1996 Act. The Third Circuit's decision to allow this increased restriction on ownership cannot be squared with Congress's express efforts to expand the level of allowable radio ownership and with the clear deregulatory thrust of Section 202, which the D.C. Circuit has previously interpreted. *See generally Chevron U.S.A., Inc. v. Natural Resource Defense Council, Inc.*, 467 U.S. 837, 842-43 (1986).

1. As noted, in Section 202, Congress redirected the Nation's media ownership policy, choosing to place increased reliance on competition rather than heavy-handed regulation to promote the public interest. *See supra* page 2. Section 202 thus dramatically overhauled the FCC's restrictive ownership regulations and put in place a mechanism for further deregulation.

Section 202(b) expressly addressed local radio ownership and rejected the overly tight constraints that the Commission then had in place. In the largest markets, for example, where previously no more than four stations could be commonly owned, Congress permitted common ownership of up to eight stations. *See* 1996 Act § 202(a), (b). These provisions, in conjunction with Section 202(h), were intended to permit more station combinations and give much-needed financial stability to struggling radio stations. *See* 141 Cong. Rec. S8424 (daily ed. June 15, 1995) (remarks of Sen. Burns) (stating that "[i]ncreased multiple ownership opportunities w[ould] allow radio operators to obtain efficiencies"); *id.* at S8431 (remarks of Sen. Pressler) (explaining that benefits of multiple ownership were necessary to allow radio to "grow strong [and] well into the next century").

2. The Commission's decision to change its longstanding radio market definition, upheld by the Third Circuit without serious scrutiny, overrides Congress's decision to set with extraordinary specificity the permissible levels of common ownership. *See supra* pages 5-6 (setting out ownership tiers). Congress's specification of a particular level of ownership in a "radio market," 1996 Act § 202(b), makes sense only in the context of a particular definition of that market – and the operative definition in 1996 was the contour approach. Congress is presumed to have been aware of the FCC's long history of using contour-based markets, as well as of the FCC's reaffirmation of that approach and its specific rejection of Arbitron in 1992 and 1994. *See 1992 Radio Order* ¶¶ 39-40 (concluding that station counts "will be made with reference to a contour overlap standard in all situations"); *1994 Radio Order* ¶ 35; *see also, e.g.*, *Commodity Futures Trading Comm'n v. Schor*, 478 U.S. 833, 846 (1986); *Lorillard v. Pons*, 434 U.S. 575, 580-82 (1978).

Indeed, this presumption, which the Third Circuit failed even to address, is amply justified here. Congress expressly referenced "radio market[s]" in the 1996 Act, directed the Commission to amend other portions of the particular regulatory *subsection* in which the contour-based definition was located, and defined in great detail ownership limits that depended critically on how markets would be defined. *See* 1996 Act § 202(b); 47 C.F.R. § 73.3555(a) (1995). The contour-based approach is thus embedded in Congress's choice of numbers; if radio markets had been defined differently, Congress would have made a different judgment.[5] *Cf. Sinclair*, 284 F.3d at 162 ("There is an obvious interrelatedness between the Commission's choice of eight [voices] and its definition of 'voices.'").

The Third Circuit's disregard for Congress's carefully calibrated judgment was only compounded by the court's approval of the Commission's grandfathering rules. These rules effectively cut back on the permitted level of common ownership retroactively, by using the stringent new market definition to prevent the transfer of station combinations properly formed in good faith reliance on the 1996 Act.

Likewise, the Commission's decision to attribute JSAs toward the number of stations a party could own in a particular local market further restricted the permissible level of common ownership. Stations that previously did not

---

[5] The Third Circuit applied this very presumption elsewhere in the *Order*, but inexplicably failed to apply it in the radio context. With respect to the "UHF discount," the court of appeals noted that "Congress instructed the Commission to 'increase the national audience reach limitation for television stations to 39%,'" and that "[s]ince 1985 the Commission has defined 'national audience reach'" to include the discount. Pet. App. 37a. The court concluded that "when Congress uses an administratively defined term, it intended its words to have the defined meaning." *Id.* It further concluded that "reducing or eliminating the discount for UHF station audiences would effectively raise the audience reach limit" and "undermine Congress's specification of a precise 39% cap." *Id.*

"count" towards the ownership limits are, as a result of the FCC's ruling, suddenly considered to be part of a commonly owned group.

3. Nothing in Section 202 validates the Third Circuit's decision to allow the FCC to ride roughshod over Congress's judgment. To the contrary, Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened.

Section 202(h) is preceded by six subsections that relaxed or extinguished then-existing FCC limits, making clear that Section 202(h) was designed to ensure continued deregulation. *See, e.g., FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (words of a statute "must be read . . . with a view to their place in the overall statutory scheme" (internal quotation marks omitted)); *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) (statutory language must be interpreted against "the backdrop of what Congress was attempting to accomplish"); *see also* H. Rep. at 118 (explaining that Congress assumed the FCC would not change its "current methodology of calculating or attributing ownership" so as to "impede the objectives" of the Act).

The D.C. Circuit read Section 202 in precisely that way. In *Fox*, the court stated that "[i]n the [1996 Act] the Congress set in motion a process to deregulate the structure of the broadcast and cable television industries," and that Section 202(h) was intended "to continue the process of deregulation." 280 F.3d at 1033. The court also explained that "the mandate of § 202(h) might . . . be likened to Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Id.* at 1044. Similarly, in *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit reiterated that "Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules," and was "designed to

continue the process of deregulation." *Id.* at 159 (internal quotation marks omitted).[6]

As the D.C. Circuit recognized, Section 202(h), read in conjunction with the remainder of Section 202, permits the Commission to relax or maintain existing regulations, but not to impose more stringent regulations that would undo the decisions Congress made. *Cf. 2000 Biennial Regulatory Review*, 16 F.C.C.R. 1207, ¶ 19 (2001) ("[A]s a part of the biennial review process, we do not intend to impose new obligations on parties in lieu of current ones, unless we are persuaded that the former are less burdensome than the latter and are necessary to protect the public interest."); *FCC 2002 Biennial Regulatory Review*, 18 F.C.C.R. 4243, 4279 (2002) (stating that to "add or expand" regulations, "as opposed to modifying or eliminating existing rules," is "beyond the scope" of the Commission's periodic review).

The Third Circuit grounded its contrary interpretation in Section 202(h)'s use of the term "modify" in the phrase "repeal or modify." *See* Pet App. 33a-34a. But "modify" in "repeal or modify" means, as it does throughout Section 202, that the Commission can *relax* existing restrictions; it does not authorize the Commission to tighten them, particularly when doing so would eviscerate the specific directives

---

[6] The D.C. Circuit addressed related but nevertheless distinct issues in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). *Cellco* involved a provision of the 1996 Act similar, but not identical, to Section 202(h): Section 11, 47 U.S.C. § 161. The *Cellco* court focused on the specific meaning of the term "necessary" in Section 11, and decided that the term did not mean "indispensable." *Cellco*, 357 F.3d at 97-98. In *Fox*, the panel had reached a contrary conclusion with respect to the term "necessary" in Section 202(h), but had eliminated that aspect of its opinion on rehearing. *Cellco* did not consider – because it was not relevant to Section 11 – how the remainder of Section 202 affects the proper interpretation of Section 202(h), or whether Section 202(h) permits the imposition of regulations that are more restrictive than those imposed expressly by Congress as part of the 1996 Act.

Congress gave in Section 202(b) as to the permissible level of multiple ownership.[7]

In support of its view of the meaning of Section 202(h), the Third Circuit also pointed to the requirement that the Commission act "in the public interest." But Section 202(h) does not impose an abstract – and entirely superfluous – public interest requirement. Rather, it channels the Commission's public interest review in a particular direction, instructing the Commission to determine whether its ownership rules are "necessary in the public interest *as the result of competition*," and "*repeal or modify* any regulation it determines to be *no longer in* the public interest." 1996 Act § 202(h) (emphasis added). Congress's specific instructions in Section 202 obviously limit how the Commission's general authority can be exercised "[]consistent with law." 47 U.S.C. §§ 154(i), 303(r); *see generally Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384-85 (1992).

4. The Third Circuit's ruling that Section 202 authorizes any action, no matter how re-regulatory and restrictive, is thus in significant tension with the decisions of the D.C. Circuit that recognized and gave force to Section 202's deregulatory thrust. *See Sinclair*, 284 F.3d at 159; *Fox*, 280 F.3d at 1044. This tension creates uncertainty for owners of media entities, and could lead to arbitrary results. Challenges to the FCC's application of its media ownership rules in the context of specific mergers must be appealed to the D.C. Circuit. *See* 47 U.S.C. § 402. Given that court's different interpretation of statutory intent and meaning, the result of such challenges would be very much in doubt.

---

[7] The word "modify" appears repeatedly in Section 202, and in each instance it authorizes easing or lifting the Commission's media ownership restrictions. *See* 1996 Act § 202(a)-(c).

Even more to the point, the Third Circuit's ruling is indefensible. As the Third Circuit would have it, Congress – despite the 1996's Act reform of the media ownership system – gave the Commission *carte blanche* to restore pre-1996 restrictions, or to impose even more restrictive rules, after waiting only a few years. Indeed, under the Third Circuit's approach the Commission could restore the national radio ownership cap that Congress eliminated in Section 202(a). 1996 Act § 202(a). Turning back the clock in that fashion simply cannot be what was anticipated by the Congress that saw competition as such a powerful reason for deregulation.[8]

Thus, the Third Circuit's interpretation of Section 202(h) – which the Commission must apply in the future to all of its media ownership rules – renders that provision a dead letter. As a matter of basic administrative law, the Commission is required to "carefully monitor the effects of its regulations and make adjustments where the circumstances so require." *ACLU v. FCC*, 823 F.2d 1554, 1565 (D.C. Cir. 1987); *see also, e.g., HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977). The Third Circuit's reading of Section 202(h) simply duplicates this background requirement, and turns into a nullity a statute that Congress intended to serve an important deregulatory purpose. Such a reading is not sustainable. *See Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992); *Hohn v. United States*, 524 U.S. 236, 249 (1998).

---

[8] To be sure, Congress did not set the contour approach in stone. If the FCC can devise a new definitional approach that is superior to the contour approach and does not tighten ownership restrictions, Section 202 does not bar it from doing so. The FCC may not, however, restrict local radio ownership by the device of simply revising the market definitions on which the tiers in the 1996 Act were based.

III. The "Top-4" Restriction On Local Television Ownership Upheld By The Third Circuit Likewise Violates Section 202 Of The 1996 Act.

The Third Circuit also contravened Section 202(h) in affirming the Commission's decision to retain the top-4 restriction on ownership of local television stations.

The Commission acknowledged that the competitive position of many local television stations, particularly in small and mid-size markets, has deteriorated substantially since 1996. Competition from cable and direct broadcast satellite has resulted in audience fragmentation and pressure on advertising revenues. *Order* ¶¶ 124-125, 143 & n.285 (Pet. App. 285a-287a, 298a-299a). Local broadcasters also must contend with the substantial costs of complying with Congress's mandate to transition to digital television, *id.* ¶ 148 (Pet. App. 301a-302a), and steep declines in the amount that the networks pay local stations to carry network programming, *id.* ¶ 168 (Pet. App. 320a). These forces have a devastating impact on broadcaster profitability. In smaller markets, many stations (especially lower-rated ones) are losing money, and even the higher-ranked stations suffer from declining profits. As the Commission concluded, "the ability of local stations to compete successfully in the delivered video market is meaningfully (and negatively) affected in mid-sized and smaller markets," and "owners of television stations in small and mid-sized markets are experiencing greater competitive difficulty than stations in larger markets." *Id.* ¶ 201 (crediting Theresa J. Ottina, *The Declining Financial Position of Television Stations in Medium and Small Markets* 5-9 (Dec. 2002)) (Pet. App. 343a-344a).

The Commission also acknowledged that the limited deregulation enacted in 1999 enabled individual weak stations to become strong combined competitors, and that local television broadcasters and viewers would see

substantial benefits from an increase in such combinations. *Id.* ¶¶ 147-168 (Pet. App. 300a-320a). Specifically, the Commission found that "common ownership of broadcast television stations in a local market can facilitate efficiencies and cost savings," which "should be available to stations in a larger number of [areas] than permitted by our current rule." *Id.* ¶ 147 (Pet. App. 300a-301a). The Commission found that the current rules unfairly penalized local broadcasters, particularly those in small and medium-sized markets, "restrict[ing] many broadcasters to suboptimal size and, therefore, hinder[ing] their ability to compete with other media for advertising revenue." *Id.* ¶ 151 (Pet. App. 303a). The Commission also concluded that common ownership generally "improved audience ratings," and that viewers generally "prefer the post-merger programming." *Id.* ¶ 150 (Pet. App. 302a-303a); *see also id.* ¶¶ 164, 168-169 (Pet. App. 316a, 320a).

The Third Circuit endorsed these conclusions, specifically noting the "localism benefits" associated with common ownership. Pet. App. 72a. Yet the Third Circuit upheld the FCC's imposition of a top-4 restriction that blocks mergers precisely where the need for common ownership is greatest: in small and mid-size markets. Indeed, the FCC's rule allows no combinations at all in 81 of the smallest 150 television markets, and only one combination in 35 more. Thus, in 77% of the markets most in need of the advantages that the FCC found to flow from common ownership, the top-4 rule prevents local stations from realizing those advantages.

The Commission thus acted without regard to the competitive viability of local television stations and the ultimate effect on viewers and broadcasters. The FCC's *Order* thwarts the substantial public interest benefits that common ownership allows and that Congress sought to achieve in Section 202. The *Order* therefore cannot be

reconciled with Section 202(h), which obliges the FCC to reevaluate the need for its ownership rules in light of competitive conditions with a view toward deregulation, and requires more than mere speculation to justify continued regulatory burdens.

In upholding the Commission's flawed rule, the Third Circuit relied, without significant analysis, on the supposed "general separation" between the market shares of the top-4 stations and the rest of the stations in a given market. Pet. App. 75a-76a; *Order* ¶ 195 (Pet. App. 337a-338a). Even if such a gap existed, however, it is not clear why that would matter: the Commission pointed to no evidence that the public interest benefits of co-ownership would be diminished if there were combinations among stations with closely matched viewing shares. Given Congress's directive in Section 202(h), evidence about actual harm to the competitive marketplace is required to justify retention of an ownership rule.

In any event, the "general separation" principle grossly oversimplifies variations among markets. Indeed, top-4 status masks critical differences among stations and is a patently inadequate proxy for whether a given merger will produce the public interest benefits acknowledged and endorsed in the *Order*.

The Third Circuit also asserted that the Commission's numerical limits on local station consolidation "already allowed, in effect, extra concentration to ensure that small-market stations would realize the efficiency benefits of consolidation," and that the Commission reasonably concluded that any consolidation in the smallest markets with fewer than five stations would give rise to "concentrated market power" that "outweighed the efficiency benefits" of common ownership. Pet. App. 73a-74a. This rationale is faulty on the same ground; it treats top-4 stations as a monolith, and fails to come to grips with the differences

between various markets and the reality of the competitive conditions that smaller-market stations face.

In short, in reviewing the top-4 rule the Third Circuit did not apply the deregulatory presumption embodied in Section 202, and thus affirmed an order full of speculation and lacking any showing of real competitive harm. This is in clear contrast to the D.C. Circuit's approach. In *Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148 (D.C. Cir. 2002), the D.C. Circuit did apply that presumption, gave the Commission's local television rules a searching examination, and remanded them for further action by the Commission – the very action that the Third Circuit ultimately reviewed in the case at hand. *See id.* at 159. Indeed, *Sinclair* remanded the rules because, in essence, they did not deregulate *enough* – the Commission failed to take full account of the competitive effect of cable television when determining whether "any of such rules are necessary in the public interest as a result of competition." 1996 Act § 202(h); *see Sinclair*, 284 F.3d at 162-64. This approach was not carried through in the Third Circuit's review of the Commission's further work on this issue, although that work was deeply flawed in similar ways; based on its misinterpretation of Section 202, the Third Circuit took a far more lax and permissive approach.

Thus, the top-4 restriction upheld by the Third Circuit contravenes Congress's intent as clearly expressed in Section 202 and will do grave harm to local stations. For these reasons, the Third Circuit's ruling on the Commission's local television rules warrants this Court's review. *See Turner*, 520 U.S. at 189-90.

CONCLUSION

The petition for a writ of certiorari should be granted.[9]

Respectfully submitted,

MARSHA J. MACBRIDE
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, D.C. 20036
(202) 429-5430

DONALD B. VERRILLI, JR.*
IAN HEATH GERSHENGORN
ELAINE J. GOLDENBERG
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

Counsel of Record

January 31, 2005

[9] Other parties have petitioned for review of the Third Circuit's decision, raising issues regarding the interpretation of Section 202 similar to those raised here (including issues involving the restrictions on newspaper/broadcast cross-ownership), and also challenging the Third Circuit's refusal to transfer the case to the D.C. Circuit. Petitioner agrees that these issues merit this Court's attention. Moreover, because these arguments are fully applicable to petitioner's position, if the Court grants one of those petitions, it should also grant review here. In particular, it would make little sense to hear a challenge involving interpretation of Section 202(h) of the 1996 Act without also considering the implications of the proper construction of that statute for the local radio and local television rules. In the alternative, petitioner respectfully requests that the Court hold the instant petition pending disposition of those other petitions.

APPENDIX

Appendix A

Statutory Provisions Involved

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

SEC. 202. BROADCAST OWNERSHIP.

(a) NATIONAL RADIO STATION OWNERSHIP RULE CHANGES REQUIRED.--The Commission shall modify section 73.3555 of its regulations (47 C.F.R. § 73.3555) by eliminating any provisions limiting the number of AM or FM broadcast stations which may be owned or controlled by one entity nationally.

(b) LOCAL RADIO DIVERSITY.--

(1) APPLICABLE CAPS.--The Commission shall revise section 73.3555(a) of its regulations (47 C.F.R. § 73.3555) to provide that--

(A) in a radio market with 45 or more commercial radio stations, a party may own, operate, or control up to 8 commercial radio stations, not more than 5 of which are in the same service (AM or FM);

(B) in a radio market with between 30 and 44 (inclusive) commercial radio stations, a party may own, operate, or control up to 7 commercial radio stations, not more than 4 of which are in the same service (AM or FM);

(C) in a radio market with between 15 and 29 (inclusive) commercial radio stations, a party may own, operate, or control up to 6 commercial radio stations, not

more than 4 of which are in the same service (AM or FM); and

(D) in a radio market with 14 or fewer commercial radio stations, a party may own, operate, or control up to 5 commercial radio stations, not more than 3 of which are in the same service (AM or FM), except that a party may not own, operate, or control more than 50 percent of the stations in such market.

(2) EXCEPTION.--Notwithstanding any limitation authorized by this subsection, the Commission may permit a person or entity to own, operate, or control, or have a cognizable interest in, radio broadcast stations if the Commission determines that such ownership, operation, control, or interest will result in an increase in the number of radio broadcast stations in operation.

(c) TELEVISION OWNERSHIP LIMITATIONS.--

(1) NATIONAL OWNERSHIP LIMITATIONS.--The Commission shall modify its rules for multiple ownership set forth in section 73.3555 of its regulations (47 C.F.R. § 73.3555)--

(A) by eliminating the restrictions on the number of television stations that a person or entity may directly or indirectly own, operate, or control, or have a cognizable interest in, nationwide; and

(B) by increasing the national audience reach limitation for television stations to 35 percent.

(2) LOCAL OWNERSHIP LIMITATIONS.--The Commission shall conduct a rulemaking proceeding to

determine whether to retain, modify, or eliminate its limitations on the number of television stations that a person or entity may own, operate, or control, or have a cognizable interest in, within the same television market.

(d) RELAXATION OF ONE-TO-A-MARKET.--With respect to its enforcement of its one-to-a-market ownership rules under section 73.3555 of its regulations, the Commission shall extend its waiver policy to any of the top 50 markets, consistent with the public interest, convenience, and necessity.

(e) DUAL NETWORK CHANGES.--The Commission shall revise section 73.658(g) of its regulations (47 C.F.R. § 658(g)) to permit a television broadcast station to affiliate with a person or entity that maintains 2 or more networks of television broadcast stations unless such dual or multiple networks are composed of--

(1) two or more persons or entities that, on the date of enactment of the Telecommunications Act of 1996, are "networks" as defined in section 73.3613(a)(1) of the Commission's regulations (47 C.F.R. § 73.3613(a)(1)); or

(2) any network described in paragraph (1) and an English-language program distribution service that, on such date, provides 4 or more hours of programming per week on a national basis pursuant to network affiliation arrangements with local television broadcast stations in markets reaching more than 75 percent of television homes (as measured by a national ratings service).

(f) CABLE CROSS OWNERSHIP.--

(1) ELIMINATION OF RESTRICTIONS.--The Commission shall revise section 76.501 of its regulations (47 C.F.R. § 76.501) to permit a person or entity to own or control a network of broadcast stations and a cable system.

(2) SAFEGUARDS AGAINST DISCRIMINATION.--The Commission shall revise such regulations if necessary to ensure carriage, channel positioning, and nondiscriminatory treatment of nonaffiliated broadcast stations by a cable system described in paragraph (1).

(g) LOCAL MARKETING AGREEMENTS.--Nothing in this section shall be construed to prohibit the origination, continuation, or renewal of any television local marketing agreement that is in compliance with the regulations of the Commission.

(h) FURTHER COMMISSION REVIEW.--The Commission shall review its rules adopted pursuant to this section and all of its ownership rules biennially as part of its regulatory reform review under section 11 of the Communications Act of 1934 and shall determine whether any of such rules are necessary in the public interest as the result of competition. The Commission shall repeal or modify any regulation it determines to be no longer in the public interest.

(i) ELIMINATION OF STATUTORY RESTRICTION.--Section 613(a) (47 U.S.C. § 533(a)) is amended--

(1) by striking paragraph (1);

(2) by redesignating paragraph (2) as subsection (a);

(3) by redesignating subparagraphs (A) and (B) as paragraphs (1) and (2), respectively;

(4) by striking "and" at the end of paragraph (1) (as so redesignated);

(5) by striking the period at the end of paragraph (2) (as so redesignated) and inserting "; and"; and

(6) by adding at the end the following new paragraph:
"(3) shall not apply the requirements of this subsection to any cable operator in any franchise area in which a cable operator is subject to effective competition as determined under section 623(1).".

(2)

No. 04-1033

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF RESPONDENT CLEAR CHANNEL COMMUNICATIONS, INC. IN SUPPORT OF PETITIONER

ANDREW W. LEVIN
CLEAR CHANNEL
COMMUNICATIONS, INC.
200 East Basse Road
San Antonio, TX 78209
(210) 822-2828

HELGI C. WALKER
Counsel of Record
RICHARD J. BODORFF
EVE KLINDERA REED
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Attorneys for Respondent
Clear Channel Communications, Inc.

192855

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the Federal Communications Commission's changes in the local radio ownership rules, leading to a substantial reduction in the number of local radio stations that may be owned and transferred, violate Section 202 of the Telecommunications Act of 1996 by administratively repealing Congress's decision to dramatically deregulate media ownership rules and expand permissible common ownership.

RULE 29.6 DISCLOSURE

Clear Channel Communications, Inc. is a publicly held company. Clear Channel Communications, Inc. has no parent company. No publicly owned company owns more than ten percent of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
RULE 29.6 DISCLOSURE	ii
TABLE OF CONTENTS	iii
TABLE OF CITED AUTHORITIES	v
INTRODUCTION	1
STATEMENT OF THE CASE	2
I. Legal and Factual Background	2
A. The Telecommunications Act of 1996	2
B. The FCC's Radio-Related Rulemakings Following Passage of the 1996 Act	5
II. The Proceedings Below	7
A. The FCC's Biennial Review Order	7
1. The Governing Legal Standard	7
2. Changes to the Local Radio Ownership Rules	8
B. The Third Circuit's Decision	10

Contents

Page

REASONS FOR GRANTING THE PETITION ... 13

I. This Case Presents Questions of Critical Importance Relating to the Structure of the Nation's Media Marketplace. 13

II. The Third Circuit's Decision Is Inconsistent with the Telecommunications Act of 1996 and Not Only Disregards but Affirmatively Frustrates Congress's Plainly Deregulatory Purpose. 20

III. The Third Circuit's Decision Conflicts with the D.C. Circuit's Decisions Regarding the FCC's Biennial Review Duties. 24

CONCLUSION 27

TABLE OF CITED AUTHORITIES

Page

CASES:

American Trucking Ass'n v. Atchison, Topeka & Santa Fe Railway Co., 387 U.S. 397 (1967) 22

Cellco Partnership v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 25, 26

Cellular Telecommunications & Internet Ass'n v. FCC, 330 F.3d 502 (D.C. Cir. 2003) 26

Commissioner v. Keystone Consolidated Industries, Inc., 508 U.S. 152 (1993) 22

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 20

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, *reh'g granted on other grounds*, 293 F.3d 537 (D.C. Cir. 2002) ..... *passim*

Goodyear Atomic Corp. v. Miller, 486 U.S. 174 (1988) 22

Gustafson v. Alloyd Co., 513 U.S. 561 (1995) 21

NBC v. United States, 319 U.S. 190 (1943) 22-23

Cited Authorities

Page

National Cable & Telecommunications Ass'n v. Gulf Power Co., 534 U.S. 327 (2002) 14

Nixon v. Missouri Municipal League, 541 U.S. 125 (2004) 14

Reno v. ACLU, 521 U.S. 844 (1997) 2

Reves v. Ernst & Young, 494 U.S. 56 (1990) 21

Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) 5, 11, 25

United States v. Locke, 471 U.S. 84 (1985) 23

United States v. Menasche, 348 U.S. 528 (1955) 23

United States v. Playboy Entertainment Group, Inc., 529 U.S. 803 (2000) 14

Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002) 2

Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) 14

Cited Authorities

Page

Verizon Maryland, Inc. v. Public Service Commission of Maryland, 535 U.S. 635 (2002) 14

DOCKETED CASES:

City of Rancho Palos Verdes v. Abrams, No. 03-1601 (argued January 19, 2005) 14

National Cable & Telecommunications Ass'n v. Brand X Internet Services, No. 04-277 (oral argument scheduled for March 29, 2005) .. 14

STATUTES AND REGULATIONS:

28 U.S.C. § 2112(a) 15

28 U.S.C. § 2342 15

47 U.S.C. § 160 26

47 U.S.C. § 161 24

47 U.S.C. § 161(a)(2) 7

Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004) 4

Hobbs Act, 28 U.S.C. § 2341, *et seq.* 10

Cited Authorities

Page

Telecommunications Act of 1996,
Pub. L. No. 104-104,
110 Stat. 56 (1996)

§ 202 ..... 1, 2, 4

§ 202(a) 2

§ 202(b) ..... *passim*

§ 202(b)(1)(A) 3

§ 202(b)(1)(B) 3

§ 202(b)(1)(C) 3

§ 202(b)(1)(D) 3

§ 202(b)(2) 3

§ 202(c) 2

§ 202(d) 2

§ 202(e) 2

§ 202(f) 2

§ 202(h) ..... *passim*

47 C.F.R. § 73.3555(a) (1995) 4

47 C.F.R. § 73.3555(a)(1) (1995) 3

47 C.F.R. § 73.3555(a)(2)(i) (1995) 9

47 C.F.R. § 73.3555 note 2 (1995) 4

Cited Authorities

Page

LEGISLATIVE MATERIALS:

141 Cong. Rec. S8061 (daily ed. June 9, 1995) ... 16

141 Cong. Rec. S8424 (daily ed. June 15, 1995) .. 16

H.R. Rep. No. 104-204 (1995) 4, 21, 22

S. Rep. No. 104-23 (1995) 2, 21

ADMINISTRATIVE MATERIALS:

2000 Biennial Regulatory Review,
16 F.C.C.R. 1207 (2001) 20

2002 Biennial Regulatory Review,
18 F.C.C.R. 4726 (2003) 7, 20

1998 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules,
15 F.C.C.R. 11058 (2000) 5

2002 Biennial Regulatory Review—Review of the Commission's Broadcast Ownership Rules,
17 F.C.C.R. 18503 (2002) 6

Definition of Radio Markets,
15 F.C.C.R. 25077 (2000) 5, 6

Implementation of Sections 202(a) & 202(b)(1) of the Telecommunications Act of 1996,
11 F.C.C.R. 12368 (1996) 5

Cited Authorities

Page

Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, 14 F.C.C.R. 12559 (1999) 8

Revision of Radio Rules & Policies, 7 F.C.C.R. 6387 (1992) 3, 4, 16

Revision of Radio Rules & Policies, 9 F.C.C.R. 7183 (1994) 3, 4

Rules & Policies Concerning Multiple Ownership of Radio Broadcast Stations in Local Markets, 16 F.C.C.R. 19861 (2001) 6

MISCELLANEOUS:

Deals, Broadcasting & Cable, Dec. 13, 2004 19

Deals, Broadcasting & Cable, Jan. 24, 2005 19

Tony Sanders, *Max Media Re-Enters Norfolk with Barnstable Buy*, Billboard Radio Monitor, Jan. 27, 2005, *at* http://www.billboardradiomonitor.com/radiomonitor/searcharticle_display.jsp?vnu_content_id=1000778527 19

INTRODUCTION

Pursuant to Rule 12.6 of the Rules of this Court, respondent Clear Channel Communications, Inc. ("Clear Channel") submits this response in support of the Petition for a Writ of Certiorari filed by the National Association of Broadcasters ("NAB"). *See* Petition for a Writ of Certiorari of the NAB, No. 04-1033 (filed Jan. 31, 2005) ("NAB Pet.").

The Federal Communications Commission's ("FCC's" or "Commission's") changes to the local radio ownership rules, which led to a substantial reduction in the number of radio stations that may be owned and transferred, violate Section 202 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act"), by administratively repealing Congress's decision to dramatically deregulate media ownership rules and to increase permissible levels of common ownership. Of particular concern to Clear Channel are the FCC's unlawful alterations to the local radio ownership rules regarding attributable interests and the transferability of station groups that exceed the new ownership limits.

This case, which involves the structure of the media marketplace in the United States, presents questions of great national importance. The Third Circuit's affirmance of the FCC's action countenances an unprecedented administrative arrogation of power, reaches a result directly at odds with Congress's unmistakably plain deregulatory purpose in the 1996 Act in general and Section 202(h) of that Act in particular, and conflicts with the decisions of the D.C. Circuit. Accordingly, NAB's Petition for a Writ of Certiorari should be granted.

STATEMENT OF THE CASE

I. Legal and Factual Background

A. The Telecommunications Act of 1996

As this Court has observed, the 1996 Act was an "unusually important legislative enactment." *Reno v. ACLU*, 521 U.S. 844, 857 (1997). "[I]ts primary purpose was to reduce regulation" in order to "promote competition in . . . the market for over-the-air broadcasting." *Id.*; *see Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 502-03 n.20 (2002) (noting the "deregulatory and competitive purposes of the [1996] Act"); S. Rep. No. 104-23, at 1 (1995) (stating that Congress intended to create a "pro-competitive, de-regulatory, national policy framework"). In Section 202 of the 1996 Act, in particular, "Congress set in motion a process to deregulate the structure of the broadcast . . . industr[y]." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033, *reh'g granted on other grounds*, 293 F.3d 537 (D.C. Cir. 2002).

To that end, Section 202 effected landmark changes in the rules governing ownership of broadcast media outlets, moving across the board to lift entirely or to loosen then-existing federal regulations that limited media ownership rights. *See* 1996 Act § 202(a) (eliminating national radio station ownership cap); *id.* § 202(b) (increasing numerical limits for local radio station ownership and eliminating audience share limitation); *id.* § 202(c) (repealing national television station ownership cap, increasing national audience reach limitation, and ordering rulemaking on local ownership limits); *id.* § 202(d) (relaxing one-to-a-market rule); *id.* § 202(e) (easing dual network ownership restrictions); *id.* § 202(f) (abolishing cable-broadcast cross-ownership restriction).

With respect to local radio ownership, Section 202(b) required the FCC to raise its limits on the number of stations that an entity could own in a specific market and to eliminate certain other restrictions. Previously, the Commission had prohibited common ownership of any more than four stations, even in the largest markets, and superimposed on that cap a presumption that any combination resulting in an audience share higher than 25% would contravene the public interest. *See Revision of Radio Rules & Policies*, 7 F.C.C.R. 6387, 6393, 6406 (1992) ("*1992 Radio Order*"). The 1996 Act uniformly expanded those multiple ownership rights by precluding the FCC from setting common ownership limits any more restrictive than: eight stations in markets with forty-five or more stations, with five or fewer in the same service (AM or FM), 1996 Act § 202(b)(1)(A); seven stations in markets with thirty to forty-four stations, with four or fewer in the same service, *id.* § 202(b)(1)(B); six stations in markets with fifteen to twenty-nine stations, with four or fewer in the same service, *id.* § 202(b)(1)(C); and five stations in markets with fourteen or fewer stations, with three or fewer in the same service, provided that no single entity could own more than fifty percent of the stations in such market, *id.* § 202(b)(1)(D). Congress also authorized the Commission to further relax these new limitations in order to permit greater common ownership if such ownership "will result in an increase in the number of radio broadcast stations in operation." *Id.* § 202(b)(2).

At the time that Congress took these historic steps, the FCC defined a radio market as the geographic area covered by the mutually overlapping contours of the stations proposed for common ownership. *See* 47 C.F.R. § 73.3555(a)(1) (1995); *Revision of Radio Rules & Policies*, 9 F.C.C.R. 7183, 7189 (1994) ("*1994 Radio Order*"); *1992 Radio Order*,

7 F.C.C.R. at 6395.[1] The Commission also had in place rules regarding the types of relationships that it considered to be "attributable" – or that would "count" towards the total number of stations that a party could own – for purposes of its local radio ownership rules. *See* 47 C.F.R. § 73.3555(a) (1995); *id.* § 73.3555 note 2.

Nothing in Section 202 suggests that Congress meant to change these foundational rules for determining permissible ownership levels. Indeed, the legislative history of the 1996 Act affirmatively makes clear that the statute did not alter the FCC's method of "attributing ownership" and that Congress did not "envision" the Commission making such changes itself. H.R. Rep. No. 104-204, at 118 (1995).

Section 202(h) is the coda to the dramatic, consistently deregulatory movements of Section 202 discussed above. That subsection mandates that the Commission review its broadcast ownership rules every two (now every four) years[2] "as part of its regulatory reform review," and that it "shall determine whether any of such rules are necessary in the public interest as a result of competition" and "shall repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h). As the D.C. Circuit correctly perceived, Section 202(h) plainly was meant to

---

1. In reaffirming the wisdom of this definition in the 1990s, the FCC had expressly rejected arguments that local radio markets should be defined purely by reference to geographic areas, finding that a contour-overlap approach provides "a more accurate measure of where a station's signal can be adequately received and, therefore, where [the station] can compete for listeners." *1994 Radio Order*, 9 F.C.C.R. at 7189; *see 1992 Radio Order*, 7 F.C.C.R. at 6395.

2. In 2004, Congress amended Section 202(h) to require such review on a quadrennial, as opposed to biennial, basis. *See* Consolidated Appropriations Act, Pub. L. No. 108-199, § 629, 118 Stat. 3, 99-100 (2004).

"continue the process of deregulation" that the rest of Section 202 – and indeed, the entire 1996 Act – commenced. *Fox*, 280 F.3d at 1033; *see Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 159 (D.C. Cir. 2002).

B. The FCC's Radio-Related Rulemakings Following Passage of the 1996 Act

Immediately following passage of the 1996 Act, the FCC amended its radio regulations as mandated by Section 202(b), leaving intact the traditional contour-overlap market definition. *See Implementation of Sections 202(a) & 202(b)(1) of the Telecomms. Act of 1996*, 11 F.C.C.R. 12368 (1996). The Commission implemented Section 202(b) without notice and comment, recognizing that the statute prohibited "any discretionary action on the part of the Commission." *Id.* at 12371.

A few years later, in its first broadcast biennial review, the newly populated FCC bemoaned the effects of the deregulation mandated by Section 202(b) and indicated that it would initiate a rulemaking to change the definition of radio markets. *See 1998 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules*, 15 F.C.C.R. 11058, 11087-91 (2000). Several Commissioners saw this strategy for what it was: an improper means of purposefully evading Congress's mandate to allow more common ownership in radio. As then-Commissioner Powell explained in the resultant rulemaking, the "effect of eliminating the Commission's current methodology and replacing it with a commercially defined market (such as Arbitron) would be to shrink markets, and thereby substantially limit the number of stations one could own." *Definition of Radio Markets*, 15 F.C.C.R. 25077, 25100 (2000) (Concurring Statement of Commissioner Powell). He cautioned that the FCC should not "us[e] the rulemaking

process as a means to circumvent specific statutory provisions and effectuate a different result than Congress intended." *Id.*; *see id.* at 25096 (Separate Statement of Commissioner Susan Ness) (expressing concern that "whatever definition we adopt should be consistent with the intent of Congress . . . in relaxing radio ownership restrictions"); *id.* at 25099 (Separate Statement of Commissioner Harold Furchtgott-Roth) (warning that the FCC should not manipulate the "definition of 'markets' in order to cut back on the concentration levels that Congress expressly set").

The Commission eventually consolidated that radio-related rulemaking with another proceeding concerning the local radio ownership rules. *See Rules & Policies Concerning Multiple Ownership of Radio Broad. Stations in Local Markets*, 16 F.C.C.R. 19861 (2001) ("*Local Radio Ownership NPRM*"). Although the FCC in 1996 read Section 202(b) as affording it no discretion *at all* to change the numerical ownership limits, the *Local Radio Ownership NPRM* asked whether the Commission's "public interest" authority permitted it to set limits *lower* than those established by statute. *Id.* at 19871-85. The FCC then rolled that entire consolidated proceeding into the 2002 broadcast biennial review, *see 2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules*, 17 F.C.C.R. 18503, 18506 (2002) ("*Omnibus NPRM*"), which produced the Commission decision at issue here, *2002 Biennial Regulatory Review—Review of the Commission's Broad. Ownership Rules*, 18 F.C.C.R. 13620 (2003) ("*Order*") (MG Pet. 206a-658a).[3]

---

3. This response cites to the appendix filed by Media General, Inc. in No. 04-1020, which concerns the same Third Circuit decision at issue here. *See* Petition for a Writ of Certiorari of Media General, Inc., No. 04-1020, at 1a-723a (filed Jan. 28, 2005). The Media General appendix is cited herein as "MG Pet. __a."

II. The Proceedings Below

A. The FCC's Biennial Review Order

1. The Governing Legal Standard

The FCC acknowledged in the *Order* that Section 202(h) requires it to determine whether its rules remain "necessary in the public interest." *Order* ¶ 11 (MG Pet. 215a). To establish the legal standard governing that review, the Commission expressly cross-referenced its decision in the contemporaneous biennial review of the FCC's telecommunications (as opposed to broadcast ownership) regulations under Section 11 of the Communications Act. *Id.* ¶ 11 n.15 (MG Pet. 215a) (citing *2002 Biennial Regulatory Review*, 18 F.C.C.R. 4726, 4730 (2003) ("*Section 11 Report*")). That statute, which was added to the Communications Act by the 1996 Act, contains the same "necessary in the public interest" language as Section 202(h). 47 U.S.C. § 161(a)(2).

In its *Section 11 Report*, the Commission interpreted the "necessary in the public interest" standard to embody nothing more than the ordinary public interest test that applies when the Commission "adopt[s] a rule in the first instance." 18 F.C.C.R. at 4730. The FCC claimed that there was "no evidence that Congress intended to impose a new or higher standard for what is 'necessary in the public interest' for purposes of" the biennial review. *Id.* The Commission attempted to justify this conclusion largely on the basis of judicial constructions of the term "necessary," as used in other statutes, to mean "useful," "convenient," or "appropriate." *Id.* at 4731.

2. Changes to the Local Radio Ownership Rules

As explained in NAB's Petition, the Commission's *Order* also radically altered the manner in which the FCC defines local radio markets, switching from a contour-overlap approach to a geographic market definition system utilizing data provided by Arbitron, a commercial ratings service. *See* NAB Pet. 3-8. The undeniable result of this change is to reduce the level of permissible common ownership of local radio stations below the levels that Congress specifically set in the 1996 Act. *See id.* at 7-8.

In another move that was clearly designed to (and indisputably does) limit the number of radio stations that a party may own in a local market, the FCC made two changes to its attribution rules. *First*, despite its conclusion just two years earlier that joint sales agreements ("JSAs")[4] should not be attributable, *see Review of the Commission's Regulations Governing Attribution of Broad. and Cable/MDS Interests*, 14 F.C.C.R. 12559, 12612-13 (1999), the Commission abruptly reversed course, concluding, without explanation, that "JSAs may convey sufficient influence or control over advertising to be considered attributable," *Order* ¶ 322 (MG Pet. 427a).

Second, the Commission increased the categories of local marketing agreements ("LMAs") that are considered to be attributable.[5] The shift in market definition from a contour-

---

4. A JSA typically authorizes a broker to sell advertising time for a station in return for a fee paid to the station. *Order* ¶ 316 (MG Pet. 422a).

5. An LMA allows a broker to produce or to supply a portion of the station's programming, often in return for a fee, and "typically provide[s] that the broker may sell advertising time and retain the advertising revenue for the programming it provides to the brokered (Cont'd)

overlap approach to the Arbitron standard further expanded the number of LMAs (as well as owned stations) that are attributable in a given market. *Order* ¶ 280 (MG Pet. 395a-97a). In addition, the Commission increased the number of LMAs that would be attributable to a party. The FCC decided to count any station (either owned or covered by an LMA, including domestic and foreign stations) that is declared "home" to an Arbitron metro market as reported by BIA.[6] *Order* ¶ 280 & nn.592-93 (MG Pet. 395a-97a & nn. 592-93). The FCC also decided to count any licensed full power radio station whose "community of license" (as defined by the FCC) is located within an Arbitron metro market. *Id.*

The FCC further restricted the activities of local radio group owners by drastically constraining their ability to transfer station combinations that had been assembled in full compliance with the FCC's pre-existing ownership regulations. With respect to owned stations, the Commission grandfathered existing groups of commonly owned stations that would exceed the limits of the new rules, but only so long as the present owner did not seek to transfer the combination. *Id.* ¶ 484 (MG Pet. 539a-541a). The FCC conclusorily stated that it would prohibit the transfer of combinations that violate the modified local radio ownership rule at the time of sale, subject to a limited exception for sales to "eligible entities." *Id.* ¶¶ 488-89 (MG Pet. 544a-45a). The Commission defined "eligible entities" as companies with $6 million or less in annual revenue.

(Cont'd)

station." *Id.* ¶ 319 n.693 (MG Pet. 424a n.693). Prior to the issuance of the *Order*, only those LMAs with stations having principal community contour overlap with an owned station were attributable. 47 C.F.R. § 73.3555(a)(2)(i) (1995).

6. BIA is a commercial service that provides research and analysis regarding the media industry. *See* www.bia.com (visited Feb. 7, 2005).

Id. ¶ 489 (MG Pet. 545a-46a). Only such entities may acquire non-compliant combinations, transfer them to other "eligible entities," and sell them to non-"eligible entities" after holding them for at least three years. *Id.* ¶ 490 (MG Pet. 546a-47a).

With respect to combinations rendered unlawful due to the existence of newly attributable JSAs and LMAs, the FCC gave licensees a mere two years from the effective date of the *Order* either to terminate agreements that do not comply with the modified local radio ownership rules, or otherwise to come into compliance with the new rules. *Id.* ¶¶ 325, 491 (MG Pet. 428a-29a, 547a). The Commission, moreover, refused to allow *any* transfers of non-compliant combinations that included newly attributable sales and programming agreements, even within the two-year period. *Id.*

B. The Third Circuit's Decision

A number of parties filed petitions for review of the *Order* in the Second, Third, Ninth, and D.C. Circuits, pursuant to the Hobbs Act, 28 U.S.C. § 2341, *et seq.* *See* MG Pet. 10a-11a. For its part, Clear Channel, which along with the majority of petitioners filed for review in the D.C. Circuit, argued that the Commission's decision to change its radio ownership rules in such a way as to *increase* the limitations on common ownership of radio stations in local markets – particularly insofar as it decided to attribute additional sales and marketing agreements and restricted transfers of grandfathered combinations – violated Congress's command in Section 202(h) that the FCC adopt only *deregulatory* changes in the biennial review. Other petitioners, including NAB, advanced similar arguments relating to the overtly regulatory character of the *Order* with respect to the local radio ownership rules and, in particular, the alterations that the FCC made to the market definition standard.

At the outset of the litigation, the Third Circuit stayed the implementation of the *Order*. *See id.* 194a-196a. The Third Circuit then denied a motion to transfer venue to the D.C. Circuit, despite the fact that the D.C. Circuit had issued the two decisions that originally remanded certain of the broadcast ownership rules for the reconsideration undertaken in the *Order*. *See id.* at 197a-205a; *see also* NAB Pet. 12; *see generally Fox*, 280 F.3d 1027; *Sinclair*, 284 F.3d 148. On the merits, the Third Circuit affirmed the FCC's contention that Section 202(h) imposes no new or different standard of review upon the agency's determination whether to retain or modify existing rules, and upheld the FCC's decision to increase regulatory burdens on radio station owners by its changes to the local radio rules.

With respect to the legal standard governing the biennial review under Section 202(h), the Third Circuit in one breath acknowledged the statute's undeniably "deregulatory" purpose, MG Pet. 34a, but in the next deprived it of any deregulatory effect whatsoever. The Court of Appeals found that all the FCC must do in the biennial review is to "determine whether its then-extant rules remain useful in the public interest" under the *same* public interest test that applies in ordinary rulemakings; only if the rules fail that lenient test must the agency make any changes. *Id.* at 35a; *see id.* at 26a-36a. In reaching this conclusion, the Third Circuit rejected arguments that Congress's admittedly deregulatory intent must be given proper force. Inexplicably, the court below found that the "repeal or modify" language in Section 202(h) authorizes the FCC to adopt "more stringent regulation" in the context of the biennial review so long as it determines that "the public interest calls for" such re-regulation. *Id.* at 34a. The Third Circuit pinned Congress's deregulatory purpose to the purely procedural obligation of the Commission "periodically to justify its existing regulations" and found that Congress placed no other constraints on the FCC's authority in the biennial review. *Id.*

With respect to the substantive radio rules, the Third Circuit rebuffed arguments that the specific levels of common ownership that Congress set in Section 202(b) of the 1996 Act, combined with Section 202(h)'s deregulatory mandate, precluded the FCC from shifting the definition of local radio markets so as to reduce the permissible levels of common ownership below those that Congress set. MG Pet. 85a-90a; *see* NAB Pet. 13-14. Similarly, the court below upheld the Commission's decision to increase the number of stations that count towards the ownership limits, thus effectively decreasing the permitted levels of common ownership even farther, by attributing additional sales and marketing agreements. MG Pet. 96a-99a; *see* NAB Pet. 14. Finally, the Third Circuit affirmed the FCC's decision to severely limit group owners' ability to transfer station combinations acquired in full compliance with the Commission's previous rules, despite the Court of Appeals' acknowledgment that this change, too, increases rather than decreases regulatory burdens. MG Pet. 91a-96a; *see* NAB Pet. 14.

When it handed down its opinion, the Third Circuit continued its stay of all of the ownership rules. *See* MG Pet. 107a. Subsequently, the Court of Appeals lifted the stay only as to the implementation of the concededly re-regulatory changes to the local radio ownership rules. *See id.* at 193a. Accordingly, the radio industry today is subject to ownership limits that are *more restrictive* than those deliberately selected by Congress in the 1996 Act, which Congress authorized the FCC, going forward, only to *loosen*. *See* NAB Pet. 15.

REASONS FOR GRANTING THE PETITION

The Third Circuit's decision not only guts the FCC's biennial review of broadcast ownership rules of any deregulatory force, but also transforms that review into a recurring opportunity for re-regulation of the broadcast industry. This is plainly not what Congress intended when it enacted Section 202(h). The decision below frustrates the clear deregulatory purpose that Congress sought to advance in Section 202 and threatens the ability of group owners, as well as the American public, to enjoy the benefits of efficiency that Congress recognized would result from increased levels of common ownership.

This Court's review is warranted because the Third Circuit's decision will have lasting adverse effects on the nation's radio industry and the listening public, sanctions the FCC's illegitimate effort to circumvent Congress's considered judgment to permit higher levels of common radio station ownership, and conflicts with the decisions of the D.C. Circuit regarding the proper scope of the Commission's biennial review duties under the 1996 Act.

I. This Case Presents Questions of Critical Importance Relating to the Structure of the Nation's Media Marketplace.

This case concerns one of the most significant duties that Congress assigned to the Commission in the 1996 Act – the biennial review required by Section 202(h). This case also relates to one of the FCC's key areas of responsibility – the ownership of our nation's mass media outlets. *See* NAB Pet. 15-16.

As explained by NAB, this Court has found that the 1996 Act was "an unusually important legislative enactment," *id.* at 16 (quoting *Reno v. ACLU*, 521 U.S. at 857), and has

thus granted *certiorari* to review a significant number of cases arising out of the FCC's implementation of that law, *id.* (citing *Verizon v. FCC*, 535 U.S. 467; *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999)); *see also Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, No. 04-277 (oral argument scheduled for Mar. 29, 2005) (reviewing FCC's decision to classify cable modem service as an "information service" pursuant to the 1996 Act); *Nixon v. Mo. Mun. League*, 541 U.S. 125 (2004) (reviewing FCC's decision regarding petition for preemption filed pursuant to the 1996 Act); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327 (2002) (reviewing FCC's decision implementing the pole attachment provisions of the 1996 Act).[7]

As a testament to the national importance of the structure of the country's media marketplace, this Court has also frequently reviewed FCC decisions relating to media ownership rules, even in the absence of a circuit split. *See* NAB Pet. 17 (citing *FCC v. Nat'l Citizens Comm. for Broad.*, 436 U.S. 775 (1978); *United States v. Storer Broad. Co.*, 351 U.S. 192 (1956); *Metro Broad., Inc. v. FCC*, 497

7. In addition to these cases specifically involving, as here, FCC actions implementing the 1996 Act, this Court has reviewed many cases arising under the 1996 Act generally. *See City of Rancho Palos Verdes v. Abrams*, No. 03-1601 (argued Jan. 19, 2005) (reviewing case arising under Section 332 of the Communications Act, as amended by the 1996 Act); *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) (addressing question whether a complaint alleging breach of the incumbent's duty under the 1996 Act to share its network with competitors states a claim under the antitrust laws); *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635 (2002) (deciding question whether the federal district courts have jurisdiction over a telecommunication carrier's claim that the order of a state utility commission requiring reciprocal compensation for telephone calls to Internet Service Providers violates the 1996 Act); *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803 (2000) (resolving constitutionality of Section 505 of the 1996 Act).

U.S. 547 (1990); *CBS, Inc. v. FCC*, 453 U.S. 367, 371 (1981); *FCC v. WNCN Listeners Guild*, 450 U.S. 582 (1981); *FCC v. Allentown Broad. Corp.*, 349 U.S. 358, 360 (1955); *FCC v. Sanders Bros. Radio Station*, 309 U.S. 470 (1940)). The Third Circuit's decision, which has nationwide effect under the Hobbs Act, *see* 28 U.S.C. §§ 2112(a), 2342,[8] poses questions of equal significance to those presented in these cases and is just as worthy of this Court's review, *see* NAB Pet. 16-17.

First, the Third Circuit's affirmance of the FCC's decision regarding the proper interpretation of Section 202(h) affects not just this particular proceeding on remand, but will as a practical matter govern all future periodic reviews of the FCC's media ownership rules. The decision below eviscerates the deregulatory purpose of the broadcast-related provisions of the 1996 Act by announcing a legal standard under which the Commission is free to make its rules – including those that Congress required the FCC to relax in other parts of Section 202 – yet more restrictive through future review proceedings under Section 202(h). In so doing, the Third Circuit's decision opens the door for the FCC to further cut back on the permissible levels of common ownership that Congress expressly set – and directed the Commission only to raise, not to lower – in the 1996 Act. Thus, the biennial review, which Congress established as a means of accomplishing additional deregulation over time, has been transformed into a recurring opportunity for re-regulation of the broadcast industry.[9]

---

8. Even apart from the nationwide effect of the decision under the Hobbs Act, the panel's express retention of jurisdiction over the FCC's action on remand ensures that the Third Circuit will necessarily review the Commission's further determinations with respect to the *Order*. *See* MG Pet. 107a.

9. Moreover, because of the Third Circuit's heavy reliance on the FCC's decision relating to the proper interpretation of Section

(Cont'd)

Second, the Third Circuit's affirmance of the rule changes adopted in the *Order* will have dramatic effects on the radio industry and radio listeners across the country. When Congress directed the FCC to raise the local radio ownership limits, it found that "[i]ncreased multiple ownership opportunities w[ould] allow radio operators to obtain efficiencies," 141 Cong. Rec. S8424, S8424 (daily ed. June 15, 1995) (remarks of Sen. Burns), that were necessary to permit radio to "grow strong and well into the next century," 141 Cong. Rec. S8061, S8076 (daily ed. June 9, 1995) (remarks of Sen. Pressler). The Commission itself, both in the *Order* and in previous decisions, has acknowledged the efficiencies and concomitant public interest benefits that flow from increased levels of common ownership. *See Order* ¶ 236 (MG Pet. 368a) (stating that as a result of the "greater consolidation of radio stations in local and national markets" permitted by the 1996 Act, "the radio industry today is on a stronger financial footing than it was a decade ago"); *1992 Radio Order*, 7 F.C.C.R. at 6393-94 (concluding that increased levels of common ownership would bring "considerable public benefit[s]" to American radio listeners); *see also* NAB Pet. 17-18 (providing additional citations). The changes to the local radio ownership rules made by the FCC and affirmed by the Third Circuit, however, threaten to deprive group owners of the efficiencies that Congress meant to promote and will prevent American radio listeners from enjoying the recognized public interest benefits that flow from those efficiencies.

The effect of all this on the broadcast industry, as NAB correctly observes, is harsh. NAB Pet. 17-18. For example, the Third Circuit itself admitted that, under the Commission's

---

(Cont'd)

11 of the Communications Act, *see* MG Pet. 28a-33a, it is highly likely that the decision below will infect the standard applied to the Commission's periodic review of non-broadcast rules as well.

revised market definition rules, "there would be an average [of] 47.5% fewer stations" in thirty-three markets of various sizes that were studied. MG Pet. 91a n.65; *see id.* at 91a (acknowledging that "the change to Arbitron Metro markets operates as a net decrease in most markets' size"). The specific impact of the market definition change on Clear Channel bears this out. The number of stations that Clear Channel may own in markets where it already owns stations was reduced, due to the new market definition rule, by 203. What is more, as a result of the shift in market definition, the number of stations that Clear Channel may own decreased in 125 of the Arbitron metro markets in which it owns stations (or 43.7% of the relevant markets) and increased in none.

With respect to the Third Circuit's affirmance of the Commission's decision to count additional sales and marketing agreements towards the local radio ownership limits, the adverse consequences for radio owners are just as real. Here, too, the Third Circuit acknowledged that this change was "an anti-deregulatory modification," MG Pet. 97a n.74, and indeed it is. At the time the FCC's *Order* was issued, Clear Channel had sales or marketing agreements with fourteen stations across the country that were rendered non-compliant by the changes in the market definition and/or attribution rules.[10]

More importantly, sales and marketing agreements are often necessary in order to keep a station profitable or to prevent it from going dark. For example, Clear Channel currently sells advertising time pursuant to a JSA on WVVV in Williamstown, West Virginia. That station is located in a market that is ranked number 243 out of the 287 markets

---

10. Clear Channel has since terminated its relationships with several parties with which it had JSAs and LMAs, based on the impending deadline to dissolve such contractual arrangements.

tracked by Arbitron (with number 1 being the largest and number 287 being the smallest).[11] The licensee provides high-quality programming for the station but lacks the ability to sell advertising time, due to the difficulty of recruiting professional salespeople. Under the rules affirmed by the Third Circuit, the newly attributable JSA with WVVV causes Clear Channel now to exceed the applicable ownership limit. Clear Channel thus must terminate the agreement within two years. The dissolution of the JSA, in turn, will require the licensee of WVVV to establish a sales staff, a task that will be exceedingly difficult if not impossible to achieve, and certainly costly. Even assuming that WVVV can acquire necessary sales personnel, it will be unable to continue to provide the present level of high-quality programming because of the need to divert resources towards advertising sales efforts. And if it cannot obtain a sales staff, the station faces the very real prospect of being forced to go dark, thereby eliminating an independent source of news and entertainment programming from the Williamstown media market.

As for transferability, the Third Circuit itself expressly recognized that the Commission's decision "depresses the price of the station combinations as a whole, which deprives combination-owners (as sellers) of their expected investments." *Id.* at 93a; *see id.* at 91a-93a; *see also* NAB Pet. 14. Clear Channel, like other group owners, has invested hundreds of millions of dollars to create station clusters that are capable of providing the efficiencies and public interest benefits produced by common ownership. The FCC's drastic limitation on transferability upheld by the Third Circuit renders that investment substantially less valuable. And this effect is not limited to just a few markets – the new rules

11. Market rankings contained herein are current as of December 30, 2004, and were obtained from the BIA Financial Media Access Pro Database, the same source that the FCC utilizes.

place Clear Channel over the ownership limits in 46 markets of varying sizes across the country.

The regulatory "exception" that would allow the transfer of non-compliant combinations to "eligible entities" does nothing to soften the severity of the transferability restriction, as the panel below implicitly conceded. *See* MG Pet. 94a (stating that "[t]he number of times the exception is invoked is irrelevant," strongly suggesting the court's recognition that the exception will rarely if ever be applied). This is because, as a practical matter, companies with $6 million or less in annual revenue are unlikely ever to obtain the level of financing needed to acquire the radio combinations at issue. In fact, many of the clusters subject to forced breakup under the *Order* are valued at amounts far beyond the reach of "eligible entities." Even single-station transactions in mid-sized markets often far exceed the annual revenue of these entities. *See, e.g.*, *Deals*, Broadcasting & Cable, Dec. 13, 2004, at 40 (single FM station in Jacksonville, Florida, the 50th ranked Arbitron metro market, sold for $7.75 million). Station groups in small to mid-sized markets sell for significantly higher amounts. *See, e.g.*, *Deals*, Broadcasting & Cable, Jan. 24, 2005, at 72 (combination of one FM station and one AM station in Hagerstown, Maryland, the 169th ranked Arbitron metro market, sold for $18 million); *id.* (combination of two FM stations in Fresno, California, the 68th ranked Arbitron metro market, sold for $25 million). The values of these transactions do not even begin to approach the values of a large number of the combinations that must be disaggregated at the time of sale, particularly those in higher-ranked markets. *See, e.g.*, Tony Sanders, *Max Media Re-Enters Norfolk with Barnstable Buy*, Billboard Radio Monitor, Jan. 27, 2005, *at* http://www.billboardradio monitor.com/radiomonitor/search/article_display.jsp?vnu_ content_id=1000778527 (combination of four FM stations

and one AM station in Norfolk, Virginia, the 40th ranked Arbitron metro market, sold for $80 million).

II. The Third Circuit's Decision Is Inconsistent with the Telecommunications Act of 1996 and Not Only Disregards but Affirmatively Frustrates Congress's Plainly Deregulatory Purpose.

While the Third Circuit paid lip service to the "plainly deregulatory" purpose of the 1996 Act in general and Section 202(h) in particular, MG Pet. 34a, its decision allows the FCC to conduct the biennial review of broadcast ownership rules in a manner directly at odds with Congress's clearly stated intention. The Commission itself has previously confirmed that "[a]dding rules, as opposed to modifying or eliminating existing rules, is clearly beyond the immediate task" in the biennial review. *Section 11 Report*, 18 F.C.C.R. at 4729; *see 2000 Biennial Regulatory Review*, 16 F.C.C.R. 1207, 1213 (2001); *see also* NAB Pet. 23. But the Third Circuit wholeheartedly endorsed the FCC's authority to do just that, finding that the Commission is free in the biennial review to adopt "more stringent regulation" as long as it "reasonably determines that the public interest" will thereby be served. MG Pet. 34a.

The only purported textual basis for the Third Circuit's decision is the term "modify" in Section 202(h)'s directive that the FCC "repeal or modify any regulation it determines to be no longer in the public interest." 1996 Act § 202(h); MG Pet. 34a. But the term "modify" cannot be interpreted in a vacuum. It is a "fundamental canon of statutory construction that the words of a statute must be read . . . with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (internal quotation marks and citation omitted). Moreover, statutory language must be interpreted against "the backdrop

of what Congress was attempting to accomplish." *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990).

Here, the Third Circuit's interpretation of Section 202(h), which expressly permits the FCC to increase regulatory burdens during the biennial review, MG Pet. 34a, does violence to Congress's purpose in passing the 1996 Act – "to promote competition and *reduce regulation*," H.R. Rep. No. 104-204, preamble (1995) (emphasis added); *see, e.g.*, S. Rep. No. 104-23, at 1 (1995) (Congress meant to provide a "pro-competitive, *de-regulatory*, national policy framework") (emphasis added); *see also* NAB Pet. 22-24; Petition for a Writ of Certiorari of the Newspaper Ass'n of America, No. 04-1045, at 19-20 (filed Jan. 31, 2005) ("NAA Pet.").

It also conflicts with the text and structure of Section 202 as a whole. Section 202(b) required the Commission to relax its local ownership limits, based on the recognition that increased multiple ownership opportunities would allow radio station operators to achieve efficiencies that would ultimately benefit the public. *See supra* pp. 2-5, 16; *see also* NAB Pet. 20. Nearly all of Section 202's other subsections likewise dramatically reduced federal media regulation, either by eliminating or substantially loosening prior limitations on ownership rights. *See supra* pp. 2-4. Section 202(h) is the coda to these consistently deregulatory movements of Section 202, and its meaning is necessarily informed by that relationship. *See Gustafson v. Alloyd Co.*, 513 U.S. 561, 575 (1995) (explaining "the doctrine of *noscitur a sociis*" ("a word is known by the company it keeps") as a "rule we rely upon to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words"). Reading Section 202(h) to permit the FCC not only to undo the deregulatory changes that Congress spelled out in the 1996 Act but to impose even greater restrictions on regulated entities than existed in 1996 turns the entire statute inside out.

The legislative history of Section 202 makes even more clear that Congress did not intend for the Commission to undercut the 1996 Act by changing its method of calculating compliance with the radio ownership limits set forth in Section 202(b). As noted above, at the time the 1996 Act was adopted, the FCC had in place well-established rules governing market definition and attribution. *See supra* pp. 3-4. Congress explicitly stated its assumption that the FCC would *not* change its "current methodology of calculating or attributing ownership" in a manner that would "impede the objectives" of the 1996 Act. H.R. Rep. No. 104-204, at 119 (1995). Even absent this type of specific guidance in the legislative history, it is axiomatic that when Congress enacts a statute against the background of settled judicial and administrative interpretation, courts must presume that Congress was aware of the earlier interpretations and, in effect, adopted them in formulating the statute. *See Comm'r v. Keystone Consol. Indus., Inc.*, 508 U.S. 152, 159 (1993); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 184-85 (1988) ("We generally presume that Congress is knowledgeable about existing law pertinent to the legislation it enacts."); *see also* NAB Pet. 20-21.

The Third Circuit purported to ground the admittedly deregulatory effect of Section 202(h) in the requirement that the Commission "periodically . . . justify its existing regulations." MG Pet. 34a. The Court of Appeals concluded that this was "an obligation [the FCC] would not otherwise have." *Id.* As a matter of substantive administrative law, this is simply inaccurate. Under this Court's settled precedents, "[r]egulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy." *Am. Trucking Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 397, 416 (1967); *see NBC v. United*

States, 319 U.S. 190, 225 (1943) (holding that the Commission cannot retain a rule if "time and changing circumstances reveal that the 'public interest' is not served by application of the Regulation[ ]"); *see also* NAB Pet. 25 (citing additional sources); NAA Pet. 22 (same). Congress must have intended to impose on the FCC *some* standard of review beyond that which already applies under the Administrative Procedure Act, *see United States v. Menasche*, 348 U.S. 528, 538-39 (1955), but the Third Circuit's interpretation of Section 202(h) as requiring nothing more than generic "public interest" review renders the provision mere surplusage.[12] If the Court of Appeals meant to say that the purely mechanical requirement of initiating the review process every number of years somehow fulfills the deregulatory purpose of Section 202(h), that is nonsensical. The Third Circuit's holding on the scope of the agency's authority in the biennial review transforms that review from

---

12. In addition, the Third Circuit substituted the term "useful" for the statutory term "necessary" in its articulation of the legal standard under Section 202(h). *Compare* MG Pet. 35a (explaining that "the Commission is required to determine whether its then-extant rules remain *useful* in the public interest") (emphasis added) *with* 1996 Act § 202(h) (providing that "[t]he Commission . . . shall determine whether [its ownership] rules are *necessary* in the public interest") (emphasis added). Regardless of the precise meaning of the term "necessary" in Section 202(h), *see* MG Pet. 28a-33a, judges plainly have no business rewriting Congressional enactments to include terms that are different from those that the legislature deliberately selected, *see, e.g.*, *United States v. Locke*, 471 U.S. 84, 95 (1985) ("[C]ourts [do not have] *carte blanche* to redraft statutes in an effort to achieve that which Congress is perceived to have failed to do. 'There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted.' ") (quoting *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978)).

a regular opportunity for further deregulation into a recurring re-regulatory nightmare.

III. The Third Circuit's Decision Conflicts with the D.C. Circuit's Decisions Regarding the FCC's Biennial Review Duties.

Prior to the Third Circuit's decision, the D.C. Circuit decided two cases dealing with Section 202(h) and one case involving Section 11 of the Communications Act, 47 U.S.C. § 161, the closely related provision governing the biennial review of telecommunications regulations. In each of those cases, the D.C. Circuit gave proper effect to Congress's clearly deregulatory purpose, interpreting the relevant statutory provision in a manner that makes clear that the Commission's biennial review duties extend beyond its ordinary obligation to ensure that its regulations serve the public interest. The Third Circuit's decision, which renders Section 202(h) a dead letter, stands in stark contrast with these decisions of the D.C. Circuit.

In *Fox*, for example, the D.C. Circuit reversed the Commission's decision in the 1998 broadcast biennial review to retain intact the 35% cap on national television station ownership. *Fox*, 280 F.3d at 1040-45. The D.C. Circuit found that Congress in Section 202 had "set in motion a process to deregulate the structure of the broadcast and cable television industries," and that Section 202(h) required the FCC to "continue" that process. *Id.* at 1033; *see* NAB Pet. 22; NAA Pet. 19; Petition for a Writ of Certiorari of Tribune Co., No. 04-1036, at 24 (filed Jan. 28, 2005) ("Tribune Pet."). In *Sinclair*, the D.C. Circuit struck down the Commission's decision to retain the "eight voices" component of its local television ownership rule and, as it had in *Fox*, found that

"Section 202(h) carries with it a presumption in favor of repealing or modifying the ownership rules." *Sinclair*, 284 F.3d at 159 (quoting *Fox*, 280 F.3d at 1048); *see* NAB Pet. 22-23; NAA Pet. 20; Tribune Pet. 24-26.

As discussed above, the Third Circuit's interpretation fails to give any independent effect to Congress's deregulatory purpose and, to the contrary, clears the way for the FCC to increase regulatory burdens on broadcasters in the biennial review. *See supra* pp. 20-24. This is plainly inconsistent with the D.C. Circuit's rulings in *Fox* and *Sinclair*. In addition, the *Order* (in the one aspect of the FCC's decision that *was* faithful in some sense to Congress's deregulatory aim) interpreted the D.C. Circuit's cases regarding the deregulatory presumption established by Section 202(h) to "upend the traditional administrative law principle requiring an affirmative justification for the modification or elimination of a rule." *Order* ¶ 11 (MG Pet. 215a). In reversing this portion of the *Order*, the Third Circuit expressly disagreed with the D.C. Circuit, concluding that its sister circuit's interpretation had "misguided" the Commission into believing that the biennial review imposed any independent obligation upon it at all. MG Pet. 34a-35a.

In *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004), the D.C. Circuit interpreted Section 11. The Third Circuit purported to rely upon the D.C. Circuit's opinion in *Cellco* to support its interpretation of Section 202(h), *see* MG Pet. 30a-33a, but the decision below actually conflicts with *Cellco*. In *Cellco*, the D.C. Circuit went to great lengths to stress the "deregulatory purpose" of the biennial review provision. *Cellco*, 357 F.3d at 97; *see* NAA Pet. 20-21. The Third Circuit, as discussed above, arrived at an interpretation of Section 202(h) that not only fails to give any effect whatsoever to that purpose but affirmatively

frustrates it. *See supra* pp. 20-24. Moreover, the D.C. Circuit confirmed that the biennial review imposes obligations that "extend[] *beyond* [the Commission's] normal monitoring responsibilities." *Cellco*, 357 F.3d at 99 (emphasis added). The Third Circuit, by contrast, held that Section 202(h) imposes obligations on the Commission that are identical to those that already apply under traditional principles of administrative law. *See supra* pp. 22-23. Finally, *Cellco* expressly extended to Section 11 the "presumption in favor of repealing or modifying covered rules" that the D.C. Circuit had found inherent in Section 202(h). *Cellco*, 357 F.3d at 97; *see* NAA Pet. 20-21. In concluding that *Cellco* "clarifi[ed]" the D.C. Circuit's rulings on the presumption in such a way as to render the FCC's reliance on the existence of such a presumption "misguided," MG Pet. 34a, the Third Circuit reached a result that cannot be squared with *Cellco* itself.[13]

In sum, the Third Circuit's construction of Section 202(h) is fundamentally irreconcilable with the D.C. Circuit's interpretation of the biennial review provisions of the 1996 Act. The Third Circuit refused to effectuate Congress's plain deregulatory intent in the 1996 Act and substituted its own judgment for that of Congress by approving an FCC decision that re-regulates local radio ownership limits to levels that Congress previously and expressly found to be too high. The D.C. Circuit, however, has given the biennial review

13. The D.C. Circuit also had previously construed Section 10 of the Communications Act, 47 U.S.C. § 160, under which the FCC in forbearance proceedings must inquire whether its rules remain "necessary" to further a particular goal, to mandate an inquiry into whether rules are "required to achieve a desired goal" and to oblige the agency to demonstrate "the existence of a strong connection" between its regulation and the goal it seeks to accomplish. *Cellular Telecomms. & Internet Ass'n v. FCC*, 330 F.3d 502, 510, 512 (D.C. Cir. 2003); *see* NAA Pet. 21 n.14. The Third Circuit's interpretation of the statutory term "necessary" is in tension with this decision as well.

provisions at least some deregulatory bite and has certainly not authorized re-regulation in the context of the biennial review. This Court's review is needed to establish consistency among the courts of appeal that may review the FCC's future periodic review decisions, and to prevent the Third Circuit's decision from perpetuating a regime under which the Commission is free to reverse the deregulatory measures that Congress in the 1996 Act unambiguously ordered the FCC to implement.

CONCLUSION

For the forgoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

ANDREW W. LEVIN
CLEAR CHANNEL
COMMUNICATIONS, INC.
200 East Basse Road
San Antonio, TX
78209
(210) 822-2828

HELGI C. WALKER
Counsel of Record
RICHARD J. BODORFF
EVE KLINDERA REED
WILEY REIN & FIELDING LLP
1776 K Street, NW
Washington, DC 20006
(202) 719-7000

Attorneys for Respondent
Clear Channel Communications, Inc.

Supreme Court, U.S.
FILED
MAY 2 - 2005
OFFICE OF THE CLERK

(4) (3) (4) (2) (2)

Nos. 04-1020, 04-1033, 04-1036, 04-1045, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

TRIBUNE COMPANY, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

NEWSPAPER ASSOCIATION OF AMERICA, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

SINCLAIR BROADCAST GROUP, INC., CROSS-PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

AUSTIN C. SCHLICK
Acting General Counsel

DANIEL M. ARMSTRONG
JACOB M. LEWIS
Associate General Counsel

NANDAN M. JOSHI
Counsel
Federal Communications Commission
Washington, D.C. 20530-0001

QUESTIONS PRESENTED

Section 202(h) of the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 111-112, requires the Federal Communications Commission to determine periodically whether its rules governing ownership of federally licensed broadcast stations remain "necessary in the public interest," and to "repeal or modify" any such rule that the FCC determines is "no longer in the public interest." Pursuant to that directive, the FCC determined in this case to: (1) replace its ban on cross-ownership of daily newspapers and broadcast stations with a cross-media rule that permits such combinations in most markets; (2) relax its local television ownership rule to generally allow common ownership of two or (in larger markets) three television stations; and (3) modify its local radio ownership rule by tightening the rule in some respects and loosening it in other respects. The questions presented are:

1. Whether the FCC's revised broadcast ownership rules violate the First or Fifth Amendment rights of newspaper owners and broadcast station licensees.

2. Whether the FCC's revised broadcast ownership rules violate Section 202(h) of the 1996 Act.

3. Whether the FCC's revised broadcast ownership rules are supported by a reasoned analysis under the Administrative Procedure Act.

TABLE OF CONTENTS

Page

Opinions below 2
Jurisdiction 2
Statement 2
Argument:
I. Further review is unwarranted because of the interlocutory posture of this case 12
II. The court of appeals correctly rejected petitioners' constitutional challenges to the FCC's broadcast ownership regulations 15
A. The FCC's broadcast ownership rules are not subject to heightened scrutiny under the First Amendment 15
B. The cross-media rule does not violate the due process or equal protection principles of the Fifth Amendment 22
III. Section 202(h) does not impair the Commission's authority to adopt and revise its ownership rules 24
IV. The conditional cross-petition in No. 04-1177 should be denied 26
Conclusion 28

TABLE OF AUTHORITIES

Cases:

American Hosp. Ass'n v. *NLRB*, 499 U.S. 606 (1991) 24
Brotherhood of Locomotive Firemen v. *Bangor & Aroostook R.R.*, 389 U.S. 327 (1967) 12
Cellco P'ship v. *FCC*, 357 F.3d 88 (D.C. Cir. 2004) 5, 26

Cases—Continued: Page

Chesapeake & Potomac Tel. Co. v. *United States*, 42 F.3d 181 (4th Cir. 1994) 23
FCC v. *League of Women Voters.*, 468 U.S. 364 (1984) 15, 20
FCC v. *National Citizens Comm. for Broad.*, 436 U.S. 775 (1978) ..... *passim*
Fox Television Stations, Inc. v. *FCC*, 280 F.3d 1027 (D.C. Cir.), modified on reh'g, 293 F.3d 537 (D.C. Cir. 2002) 4, 5, 16, 22, 25
Leathers v. *Medlock*, 499 U.S. 439 (1991) 22
McConnell v. *FEC*, 540 U.S. 93 (2003) 19
Minneapolis Star & Tribune Co. v. *Minnesota Comm'r of Rev.*, 460 U.S. 575 (1983) 22
Minnick v. *California Dep't of Corr.*, 452 U.S. 105 (1981) 14
National Broad. Co. v. *United States*, 319 U.S. 190 (1943) 3, 14, 16, 17, 22
News Am. Pub'g, Inc. v. *FCC*, 844 F.2d 800 (D.C. Cir. 1988) 23
Pennsylvania Dep't of Corr. v. *Yeskey*, 524 U.S. 206 27
Porter v. *Warner Holding Co.*, 328 U.S. 395 (1969) 26
Radio-Television News Dirs. Ass'n v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000) 20
Red Lion Broad. Co. v. *FCC*, 395 U.S. 367 (1969) 19
Reno v. *ACLU*, 521 U.S. 844 (1997) 18
Rescue Army v. *Municipal Ct.*, 331 U.S. 549 (1947) 14

Cases—Continued: Page

Sinclair Broad. Group, Inc. v. *FCC*, 284 F.3d 148 (D.C. Cir. 2002) 5, 16, 25
Spector Motor Serv. v. *McLaughlin*, 323 U.S. 101 (1944) 13
Telecommunications Research & Action Ctr. v. *FCC*, 801 F.2d 50 (D.C. Cir. 1986) 16
Turner Broad. Sys. v. *FCC*, 512 U.S. 622 (1994) 17, 18, 22, 23, 27
United States v. *Storer Broad. Co.*, 351 U.S. 192 (1956) 3
U.S. West v. *United States*, 48 F.3d 1092 (9th Cir. 1994) 23
Virginia Military Inst. v. *United States*, 508 U.S. 946 (1993) 12
Ward v. *Rock Against Racism*, 491 U.S. 781 (1989) 22
Watson v. *Buck*, 313 U.S. 387 (1941) 14
Weinberger v. *Romero-Bracelo*, 456 U.S. 305 (1982) 26

Constitution, statues and rule:

U.S. Const.:
Amend. I 8, 12, 16, 19, 27
Amend. V 8, 12, 22
Communications Act of 1934, 47 U.S.C. 151 *et seq.* 2
47 U.S.C. 161 (§ 11) 5
47 U.S.C. 301 ..... 2, 3, 17
47 U.S.C. 309(a) 3, 15, 17
47 U.S.C. 309(h) 3
47 U.S.C. 309(k) 3

Statutes and rule—Continued: Page

47 U.S.C. 310(d) 3, 17

Consolidated Appropriations Act, 2004 Pub. L. No. 108-109, Div. B, § 629, 118 Stat. 99 ..... 4, 8

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 100-162, 103 Stat. 1020-1021 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2136 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 797 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1846 21

Departments of Commerce, Justice and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1166-1167 21

Department of Commerce, Justice, and State, the Judiciary, and Agencies 1995 Appropriations and 1994 Supplemental Appropriations Act, Pub. L. No. 103-317, 108 Stat. 1738 21

Statutes and rule—Continued: Page

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 4
§ 202(a)-(f), 110 Stat. 110-111 ..... 4, 7, 25
§ 202(h), 110 Stat. 111-112 ..... 4, 6, 9, 12, 25
28 U.S.C. 2112(a)(3) 8
Sup. Ct. R. 10 15

Miscellaneous:

Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965) 20
Repeal or Modification of the Personal Attack and Political Editorial Rules, In re, 15 F.C.C.R. 19,973 (2000) 20
Robert Stern et al., *Supreme Court Practice* (8th ed. 2002) 12
Syracuse Peace Council, In re, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990) 19
2002 Biennial Regulatory Review, 77 F.C.C.R. 18,503 6
U.S. Dep't of Justice & FTC, *Horizontal Merger Guidelines* (rev. Apr. 8, 1997) 10

In the Supreme Court of the United States

No. 04-1020

MEDIA GENERAL, INC., PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1033

NATIONAL ASSOCIATION OF BROADCASTERS, PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1036

TRIBUNE COMPANY, ET AL., PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1045

NEWSPAPER ASSOCIATION OF AMERICA, ET AL., PETITIONERS
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

No. 04-1177

SINCLAIR BROADCAST GROUP, INC., CROSS-PETITIONER
v.
FEDERAL COMMUNICATIONS COMMISSION, ET AL.

ON PETITIONS AND CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-190a[1]) is reported at 373 F.3d 372. The report and order of the Federal Communications Commission (Pet. App. 206a-723a) is reported at 18 F.C.C.R. 13,620.

JURISDICTION

The judgment of the court of appeals was entered on June 24, 2004. A petition for panel rehearing was granted in part on September 3, 2004 (Pet. App. 191a-193a). On November 22, 2004, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including January 3, 2005, and on December 21, 2004, Justice Souter further extended the time within which to file a petition for a writ of certiorari to and including January 31, 2005. The petitions in Nos. 04-1020, 04-1033, 04-1036, and 04-1045 were filed on January 28 and January 31, 2005. The cross-petition in No. 04-1177 was filed on March 2, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Communications Act of 1934 (Communications Act), 47 U.S.C. 151 *et seq.*, establishes a comprehensive framework for federal regulation of the transmission and use of radio signals in the United States. The Act establishes a federal policy of "maintain[ing] the control of the United States over all the channels of radio transmission" and "provid[ing] for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority." 47 U.S.C. 301. The Act thus requires persons seeking to engage in radio or television broadcasting to obtain a broadcast license

---

[1] Unless otherwise indicated, "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 04-1020.

for a limited, but renewable, period of time from the Federal Communications Commission, *ibid.*, and prohibits the assignment or transfer of any such license without the Commission's prior approval, 47 U.S.C. 309(h), 310(d).

Before it may grant, renew, or approve the assignment or transfer of a broadcast license, the Commission must conclude that such action would serve the "public interest, convenience, and necessity." 47 U.S.C. 309(a), 310(d); see 47 U.S.C. 309(k). Among the policies the Commission has advanced in exercising its broadcast licensing responsibilities is a policy favoring diversification of mass media ownership as benefiting the public interest "by promoting diversity of program and service viewpoints, as well as by preventing undue concentration of economic power." *FCC* v. *National Citizens Comm. for Broad.*, 436 U.S. 775, 780 (1978) (*NCCB*).

To facilitate even-handed implementation of its policies and to provide certainty to the broadcast industry, the Commission has adopted generally applicable regulations that embody its judgments about the circumstances in which the issuance, assignment, or transfer of a broadcast station license would serve the public interest. See, *e.g.*, *United States* v. *Storer Broad. Co.*, 351 U.S. 192, 202-205 (1956). Those regulations have long imposed limits on the number of radio or television stations a single party may own nationally or in a local market, as well as limits on cross-ownership of broadcast stations and other media in the same market. See, *e.g.*, *ibid.* (upholding ownership limits on radio and television stations); *NCCB*, 436 U.S. at 793-802 (upholding prohibition on cross-ownership of daily newspapers and broadcast stations). The Commission deems proposed broadcast combinations that violate its ownership limits inconsistent with the public interest, absent a showing that waiver of a rule is warranted in a particular case. See *id.* at 793; *Storer Broad. Co.*, 351 U.S. at 205; *National Broad. Co.* v. *United States*, 319 U.S. 190, 225 (1943) (*NBC*).

2. In the Telecommunications Act of 1996 (1996 Act), Pub. L. No. 104-104, 110 Stat. 56, Congress directed the Commission to make a number of changes to its broadcast ownership rules. See 1996 Act § 202(a)-(f), 110 Stat. 110-111. In addition, Section 202(h) of the 1996 Act imposed a general duty on the Commission to review its ownership rules periodically to determine "whether any of such rules are necessary in the public interest as the result of competition," 110 Stat. 112, and to "repeal or modify any regulation it determines to be no longer in the public interest." *Ibid.* Section 202(h) originally directed the Commission to review its ownership rules biennially, 110 Stat. 111, but in 2004, while this case was pending in the court of appeals, Congress amended the statute to provide for Commission review every four years. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99.

In a pair of cases decided in 2002, the D.C. Circuit examined the effect of Section 202(h) on the Commission's authority to regulate broadcast ownership in the public interest. First, in *Fox Television Stations, Inc.* v. *FCC*, 280 F.3d 1027, modified on reh'g, 293 F.3d 537 (2002), the D.C. Circuit examined the Commission's decision in the first biennial review under Section 202(h) to retain without modification existing rules on national television station ownership and on cross-ownership of television stations and cable systems in local markets. The court emphasized that "nothing in § 202(h) signals a departure from [the] historic scope" of the Commission's public interest authority. *Id.* at 1042. The court concluded that Section 202(h) requires the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision that accounts for the state of competition in the relevant media markets.[2] See *id.* at

[2] The *Fox* panel initially interpreted the phrase "necessary in the public interest" in Section 202(h) to mean that a "regulation should be retained only insofar as it is necessary in, not merely consonant with, the public interest." 280 F.3d at 1050. On rehearing, the panel modified its decision to leave open

1042, 1044. Because, in the court's view, the Commission had not adequately explained its decision to retain the national television and cable-television cross-owner rule, the court remanded those rules to the Commission for further consideration. [3]

In *Sinclair Broadcast Group, Inc.* v. *FCC*, 284 F.3d 148 (2002), the D.C. Circuit remanded (but did not vacate) the Commission's 1999 revision of the local television ownership rule. The revised rule allowed common ownership of two television stations in a local market where neither station is among the top-four rated stations in the market (the "top-four" test) and the market contains at least eight other "voices," which the Commission defined as independently owned and operating, full-power television stations. The *Sinclair* court recognized that the Commission "has wide discretion to determine where to draw administrative lines." *Id.* at 162, 170 (internal quotation marks omitted). The court remanded the rule, however, because it concluded that the Commission had not adequately explained why it counted only television stations as voices in the local television ownership rule, while counting other media outlets (including daily newspapers and cable systems) as voices in its rule governing cross-ownership of radio and television stations. *Id.* at 164.

---

the question of the standard that the Commission must meet under Section 202(h). 293 F.3d at 541. In *Cellco Partnership* v. *FCC*, 357 F.3d 88 (2004), the D.C. Circuit subsequently held that the Commission reasonably interpreted similar language in Section 11 of the Communications Act, 47 U.S.C. 161, to require it only to "reevaluate regulations in light of current competitive market conditions to see that the conclusion [it] reached in adopting the rule—that [the rule] was needed to further the public interest—remains valid." 357 F.3d at 98 (internal quotation marks omitted).

[3] Although the *Fox* court vacated the cable-television cross-ownership restriction, it remanded the national television ownership rule without vacating it because the court concluded that the Commission might be able to justify retention of the rule on remand. 280 F.3d at 1049.

3. In September 2002, the Commission initiated its third biennial proceeding under Section 202(h) to review its broadcast ownership rules. *2002 Biennial Regulatory Review*, 17 F.C.C.R. 18,503 (2002). The 2002 biennial review sought comment on the D.C. Circuit's decisions in *Fox* and *Sinclair*. *Id.* at 18,508-18,512 ¶¶ 12-19. The proceeding also incorporated other rulemaking proceedings that the Commission had previously initiated to reexamine its regulations governing local radio station ownership and cross-ownership of daily newspapers and broadcast stations. *Id.* at 18,506 ¶ 7.

The consolidated biennial review proceeding culminated on July 2, 2003, with the release of the Report and Order at issue in this case. As relevant here, the Report and Order established a single new cross-media rule to govern cross-ownership of daily newspapers, television stations, and radio stations, and modified two other rules that limit common ownership of multiple radio and multiple television stations in a local market.

Cross-media rule. The cross-media rule replaced, *inter alia*, the blanket prohibition on common ownership of daily newspapers and broadcast stations that this Court upheld in *NCCB*. The cross-media rule prohibits combinations involving a daily newspaper and a broadcast station, or a radio station and a television station, in local markets with three or fewer television stations. Pet. App. 521a-522a (Order ¶ 454); 04-1036 Pet. App. 661a. In local markets that have four to eight television stations, such cross-media combinations are permitted with certain limitations. Pet. App. 530a (Order ¶ 466); 04-1036 Pet. App. 661a. In local markets with nine or more television stations, the Commission imposed no cross-media limit. Pet. App. 534a (Order ¶ 473).

Local television ownership rule. In response to the decision in *Sinclair*, the Commission relaxed the local television ownership rule by replacing the "eight-voice" test with a tiered approach in which ownership limits are tied to the number of television stations in the market. Under the revised rule, a party may

own two commercial television stations in individual markets with 17 or fewer television stations and three commercial stations in markets with 18 or more television stations. Pet. App. 290a-291a (Order ¶ 134); 04-1036 Pet. App. 660a-661a. The revised rule continues to prohibit combinations involving the four highest-rated television stations in the market. Pet. App. 331-332a (Order ¶ 186); 04-1036 Pet. App. 661a. That "top four" restriction thus precludes common ownership of multiple television stations in markets with four stations or fewer.

Local radio ownership rule. The Commission did not modify the numerical limits in the local radio ownership rule, which Congress had directed the Commission to establish in the 1996 Act. See 1996 Act § 202(b), 110 Stat. 110. The Commission did revise the method of determining the scope of the radio market to which the fule's numerical limits apply, Pet. App. 390a-391a (Order ¶¶ 273-274); it required inclusion of noncommercial radio stations when counting the number of radio stations in the market, *id.* at 408a (Order ¶ 295), see 04-1036 Pet. App. 659-660a; and it counted certain agreements concerning the sale of radio advertising (commonly called "Joint Sales Agreements") as ownership interests for purposes of applying the ownership limits, Pet. App. 422a-429a (Order ¶¶ 316-325); see also 04-1036 Pet. App. 664a-665a.[4]

---

[4] The 2002 biennial review also addressed two other rules related to ownership of television stations. The Commission decided to retain its "dual network" rule, which prohibits mergers among the top-four broadcast television networks (ABC, NBC, CBS, and Fox). Pet. App. 610a-629a (Order ¶¶ 592-621). That decision was not challenged in the court of appeals. In addition, the Commission relaxed its national television ownership rule to allow common ownership of television stations that reach 45% (as opposed to the previous limit of 35%) of the national television audience. *Id.* at 552a-610a (Order ¶¶ 499-591). In 2004, while this case was pending before the court of appeals, Congress amended the 1996 Act to increase the national television audience reach limitation from 35% to 39%, and provided that rules relating to that limitation would no longer be subject to the now-quadrennial review

4. Petitions for review were filed in several circuits, triggering a judicial lottery under 28 U.S.C. 2112(a)(3). The Third Circuit was selected to review the Commission's decision. On September 3, 2003, the court of appeals stayed the Commission's revised rules pending its review of the Report and Order. Pet. App. 194a-196a. The court also declined to transfer the case to the Court of Appeals for the District of Columbia Circuit. *Id.* at 197a-205a.

5. a. On June 24, 2004, the Third Circuit issued its decision on the merits. All three judges on the panel determined that the Commission's limits on broadcast ownership do not violate the First and Fifth Amendment rights of newspaper owners and broadcasters. Pet. App. 45a-48a.[5] The court stated that petitioners' First Amendment arguments were foreclosed by *NCCB*, in which this Court upheld the nationwide ban on newspaper-broadcast cross-ownership as "a reasonable means of promoting the public interest in diversified mass communications." *Id.* at 46a (quoting *NCCB*, 436 U.S. at 802). In addition, the court stated that, even if *NCCB* did not control, it would assess petitioners' First Amendment challenge under rational-basis review in light of the continuing physical scarcity of broadcast spectrum. *Id.* at 47a (noting that "many more people would like access to [broadcast spectrum] than can be accommodated"). Similarly, the court of appeals concluded that petitioners' equal protection claims were foreclosed by this Court's rejection in *NCCB* of an equal protection challenge to the newspaper-broadcast cross-ownership restriction. *Id.* at 45a-46a. The court added that the devel-

---

process. Consolidated Appropriations Act, 2004, Pub. L. No. 108-199, Div. B, § 629, 118 Stat. 99. The court of appeals in this case found that the challenge to that limitation was thereby rendered moot. See Pet. App. 36a-38a.

[5] Although Chief Judge Scirica did not join the panel majority's analysis of the petitioners' constitutional claims, his conclusion that the Commission's ownership rules should have been affirmed is an implicit rejection of such claims. See Pet. App. 190a.

opment of more media outlets since *NCCB* was not a basis for reaching a different result, because it could not be "assumed that these media outlets contribute significantly to viewpoint diversity as sources of *local* news and information." *Id.* at 46a (emphasis added).

The court likewise rejected petitioners' arguments that Section 202(h) of the 1996 Act limited the Commission's authority to adopt more restrictive ownership rules and imposed a heightened burden on the Commission to justify any ownership limits that it decides to retain. Pet. App. 26a-36a; see *id.* at 124a (Scirica, J., dissenting) ("[T]he statute does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest.").

b. In a portion of the panel opinion from which Chief Judge Scirica dissented, the court of appeals concluded that the Commission's cross-media rule and local television and radio rules should be remanded for "additional justification or modification." Pet. App. 12a. For each of the three rules, the majority rejected the specific limits that the Commission had adopted (or, in the case of the local radio rule, retained). The majority emphasized that it was not passing final judgment on the ultimate permissibility of the particular ownership limits chosen by the Commission. Instead, the court stated, "the Commission gets another chance to justify its actions." *Id.* at 12a n.3.

Cross-Media Rule. The court of appeals held that the Commission's determination that "the blanket ban on newspaper/broadcast cross-ownership was no longer in the public interest" was "justified under § 202(h) [of the 1996 Act] and is supported by record evidence." Pet. App. 40a; see *id.* at 40a-44a. But the court concluded that some aspects of the Commission's new cross-media rule, which replaced the newspaper/broadcast cross-ownership ban, were not supported by a "reasoned analysis." *Id.* at 48a. The majority focused its criticism on the Commission's use of a Diversity Index, a tool based loosely on the

Herfindahl-Hirschman Index used in antitrust analysis, to inform its judgment in setting ownership limits for local media markets of various sizes. See *id.* at 49a. In particular, the majority rejected the Commission's decision to evaluate diversity by assigning equal weight to "all outlets within the same media type (that is, television stations, daily papers, or radio stations)." *Id.* at 58a. The court also found the Diversity Index flawed because, in the view of the panel majority, it "gave too much weight to the Internet as a media outlet," *id.* at 49a, and "allow[ed] some combinations where the increases in Diversity Index scores were generally higher than for other combinations that were not allowed," *id.* at 63a.

Local Television Ownership Rule. The court of appeals likewise remanded, for further consideration by the agency, the specific local television ownership limits that the Commission had adopted. Pet. App. 76a-79a. In constructing the local television rule, the Commission had begun with the goal of preserving six equal-sized competitors (see *id.* at 335a-336a (Order ¶ 192)), and, except for purposes of applying the top-four restriction, it treated each television station in the market as having equal significance. *Id.* at 76a. The court upheld the Commission's decision to retain the top-four restriction. But, in line with its analysis of the cross-media limits, the panel majority stated that in its view "no evidence" supported the Commission's equal weighting of local stations in setting ownership limits and further concluded that such weighting was unreasonable insofar as it allowed concentration—as measured by audience share—to exceed a Herfindahl-Hirschman Index level of 1800. *Id.* at 78a; see generally U.S. Dep't of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* § 1.5 (rev. Apr. 8, 1997) (designating markets with a level above 1800 as "highly concentrated"). The court therefore remanded the numerical limits for local television ownership "for the Commission to support and harmonize its rationale." Pet. App. 79a.

Local Radio Ownership Rule. The court upheld much of the Commission's approach to local radio ownership, including the Commission's decision to adopt a new methodology for delineating local radio markets, Pet. App. 90a, and to count noncommercial stations and Joint Sales Agreements for purposes of applying the ownership rules, *id.* at 90a-91a, 96a-99a. But the court concluded that the Commission's decision to retain the specific ownership limits that had been adopted by Congress in 1996 was not supported by "reasoned analysis." *Id.* at 102a. In doing so, the panel majority again rejected the Commission's reliance on a benchmark that evaluated competition or diversity in terms of number of outlets rather than audience shares. *Id.* at 104a-106a. In the majority's view, "[i]t defies logic to assume that a combination of top-ranked stations is the competitive equal to a combination of low-ranked stations just because the two combinations have the same number of stations." *Id.* at 104a.

c. Chief Judge Scirica dissented from the court of appeals' decision to remand the FCC's ownership rules. In the Chief Judge's view, the majority had "substituted its own policy judgment for that of the * * * Commission." Pet. App. 108a. Noting that "[i]t is not the role of the judiciary to second-guess the reasoned policy judgments of an administrative agency acting within the scope of its delegated authority," the Chief Judge explained that he would have upheld the order on review, lifted the stay, and allowed the Commission's revised rules to go into effect. *Ibid.*

6. In issuing its decision, the court of appeals extended its stay of the Commission's revised broadcast ownership rules "pending [the court's] review of the Commission's action on remand." Pet. App. 107a. On September 3, 2004, in response to the government's petition for panel rehearing, the court partially lifted its stay to permit the Commission's revised local radio ownership rules—which the court had largely upheld—to go into effect. *Id.* at 193a. The court denied the government's rehearing

petition in other respects, however, and the cross-media limits and the local television ownership rules remain stayed.

ARGUMENT

Petitioners in this case are newspaper and broadcast industry parties, most of whom challenged the Commission's ownership regulations in the court of appeals. In Nos. 04-1020, 04-1036, and 04-1045, petitioners contend that the ownership regulations, particularly the cross-media rule, violate the First and Fifth Amendments to the United States Constitution. In Nos. 04-1033, 04-1036, and 04-1045, petitioners assert that the ownership rules under review had to be relaxed further—and could in no event be tightened—under Section 202(h) of the 1996 Act. Finally, petitioners in No. 04-1045—who intervened in the court of appeals in support of the FCC's cross-media rule—seek review of the Third Circuit's decision to remand and stay, rather than affirm, the Commission's revised ownership rules. None of the petitions raises any issue that merits further review by this Court in the present posture of the case.

I. FURTHER REVIEW IS UNWARRANTED BECAUSE OF THE INTERLOCUTORY POSTURE OF THIS CASE

1. This case is in an interlocutory posture and therefore does not provide an appropriate vehicle for addressing petitioners' claims. See, *e.g.*, *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) (declining to exercise certiorari jurisdiction where the court of appeals had remanded the case); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (opinion of Scalia, J.); see generally Robert Stern et al., *Supreme Court Practice* § 4.18, at 258 (8th ed. 2002). That is particularly true with respect to petitioners' constitutional claims, which ask this Court to reconsider long-established doctrines and overrule past precedents against the backdrop of an unsettled regulatory regime.

Had the Third Circuit upheld the new broadcast ownership rules, this case would have presented the question whether those otherwise-valid rules could survive the stricter constitutional standards petitioners advocate. The court of appeals, however, rejected aspects of the Commission's explanations of those rules and generally stayed the rules' effectiveness pending reconsideration by the FCC on remand. In the current posture of this case, therefore, there is an unreversed determination that the Commission failed adequately to justify the new rules under ordinary, nonconstitutional standards applicable to judicial review of administrative action. In light of that ruling, and absent this Court's review of the court of appeals' case-specific application of the Administrative Procedure Act standards to the FCC's determinations, the case does not present at this time the question whether the new rules are constitutional.

Nor does this case squarely present the question whether the prior broadcast ownership rules would satisfy the new, more stringent constitutional standard petitioners advocate. The old rules were not challenged in this proceeding and, although they are temporarily now back in force due to the Third Circuit's stay of the new rules, they are likely to be changed as a result of the remand proceedings. Petitioners' constitutional challenges are thus in effect directed to future rules—as yet unadopted—that the Commission may choose to promulgate after remand, and not to any ownership rules in place today.

As this Court has long emphasized, weighty prudential considerations counsel against unnecessary pronouncements on constitutional matters; without a concrete application of the constitutional standard to a particular governmental action or rule, the Court cannot be certain that resolution of a constitutional issue is necessary.[6] The Court's reluctance to entertain abstract issues of

---

[6] See, *e.g.*, *Spector Motor Serv.* v. *McLaughlin*, 323 U.S. 101, 105 (1944) ("If there is one doctrine more deeply rooted than any other in the process of constitutional adjudication, it is that we ought not to pass on questions of

constitutional law is also based on the benefits to the Court's decisionmaking process of the context provided by a particular concrete dispute; such a context is likely to help focus the Court's attention on important aspects of the legal problem and on consequences of the Court's decision that might otherwise be obscured. Because "all contingencies of attempted enforcement cannot be envisioned in advance of those applications," this Court has "found it wiser to delay passing upon the constitutionality" of a statute or regulation "until faced with cases involving particular provisions as specifically applied to persons who claim to be injured." *Watson* v. *Buck*, 313 U.S. 387, 402 (1941).

2. The interlocutory posture of the case also counsels against further review of the nonconstitutional issues presented by petitioners. In remanding the FCC's revised ownership rules, the Third Circuit correctly articulated the deferential standard of review that courts must apply in examining the Commission's ownership rules. See, *e.g.*, *NCCB*, 436 U.S. at 794; *NBC*, 319 U.S. at 219. Moreover, the court of appeals emphasized that it was not finally passing judgment on the validity of the new broadcast ownership rules, but was merely remanding for what it perceived to be an inadequacy in the Commission's justification for "certain aspects" of the new rules. Pet. App. 11a. In response to the claim that "the Commission's work * * * comes close enough to merit our approval," the court's response was "not yet." *Id.* at 12a n.3; see *ibid.* ("[T]he Commission gets another chance to justify its actions.").[7] Although the government believes the court erred in

---

constitutionality * * * unless such adjudication is unavoidable."); see also *Minnick* v. *California Dep't of Corr.*, 452 U.S. 105, 122 n.30 (1981); *Rescue Army* v. *Municipal Ct.*, 331 U.S. 549, 568-569 (1947).

[7] See also Pet. App. 58a ("On remand the Commission must either exclude the Internet from the media selected for inclusion in the Diversity Index or provide a better explanation for why it is included in light of the exclusion of cable."); *id.* at 61a ("[W]e remand for the Commission's additional consideration of this aspect of the Order."); *id.* at 79a ("We remand the numerical limits for

failing to uphold the new rule, the factbound question whether the Commission adequately provided sufficient justifications for its new rules does not warrant further review. The Third Circuit's decision to remand rather than affirm was thus a "misapplication of a properly stated rule of law" that does not warrant the exercise of this Court's certiorari jurisdiction if the case is not otherwise before the Court on the merits. Sup. Ct. R. 10. The Court should deny review in this case and allow the Commission on remand to decide what broadcast ownership rules are appropriate, and to explain why they are justified.

II. THE COURT OF APPEALS CORRECTLY REJECTED PETITIONERS' CONSTITUTIONAL CHALLENGES TO THE FCC'S BROADCAST OWNERSHIP REGULATIONS

A. The FCC's Broadcast Ownership Rules Are Not Subject to Heightened Scrutiny Under the First Amendment

1. The court of appeals applied settled law when it concluded that the FCC's broadcast ownership rules must be upheld under the First Amendment if they are "rationally related to a substantial governmental interest." Pet. App. 47a. It is "well established" that Congress "has power to regulate the use of [broadcast spectrum as] a scarce and valuable national resource," and to "ensure through the regulatory oversight of the FCC that only those who satisfy the 'public interest, convenience, and necessity' are granted a license to use radio and television broadcast frequencies." *FCC* v. *League of Women Voters*, 468 U.S. 364, 376 (1984) (quoting 47 U.S.C. 309(a)). As this Court stated in *NCCB*, "nothing in the First Amendment * * * prevent[s] the Commission from allocating licenses so as to promote the 'public interest' in diversification of the mass communications media." 436 U.S. at 799. "Denial of a station license" on public interest grounds, "if

---

the Commission to support and harmonize its rationale."); *id.* at 102a ("We thus remand for the Commission's additional justification.").

valid under the Act, is not a denial of free speech." *NBC*, 319 U.S. at 227.

There is no basis for Tribune's assertion (04-1036 Pet. 13) that the Third Circuit's decision creates "conflict and uncertainty" regarding the First Amendment analysis applicable to the FCC's ownership regulations. Although Tribune cites (04-1036 Pet. 14) individual judges who have expressed a range of views on the proper First Amendment analysis of broadcast regulation generally, the critical views cited by petitioners were generally directed at *content* regulation, not *ownership* regulations like those at issue here.[5] The courts of appeals that have reviewed the FCC's broadcast ownership regulations uniformly have applied the same, established standard. See *Fox*, 280 F.3d at 1046 ("the deferential review undertaken by the Supreme Court in *NCCB* and *NBC* is also appropriate here"); *Sinclair*, 284 F.3d at 168 ("Sinclair does not have a First Amendment right to hold a broadcast license where it would not [under the Commission's ownership regulations] satisfy the public interest."). There is no conflict in the circuits on the constitutional issues petitioners present.

The Third Circuit held (Pet. App. 46a), and Media General effectively concedes (04-1020 Pet. 25), that petitioners' constitutional contentions are "foreclosed" by this Court's decision in *NCCB*. Petitioners nonetheless contend (04-1020 Pet. 22-23; 04-1036 Pet. 13, 15-16; 04-1045 Pet. 26) that the growth in the number of licensed broadcast stations since *NCCB*, and the development of non-broadcast media outlets, justify overruling *NCCB* and mandating heightened scrutiny of the FCC's ownership regulations under the First Amendment. The Third Circuit correctly rejected that argument and its reliance on changed market condi-

---

[5] The only decision of a court of appeals—as opposed to opinions by individual judges—cited by Tribune concerned whether the FCC could engage in "political content regulation" of broadcasting speech, *Telecommunications Research & Action Ctr.* v. *FCC*, 801 F.2d 501, 506 (D.C. Cir. 1986), and the court's discussion focused on that issue.

tions. Pet. App. 47a. As stated in *NCCB* and other decisions of this Court, deference to the FCC's licensing policies arises from the bedrock principle that access to radio frequencies, "unlike other modes of expression, * * * is subject to governmental regulation" because there is a "fixed natural limitation upon the number of stations that can operate without interfering with one another." *NBC*, 319 U.S. at 213, 226. See *NCCB*, 436 U.S. at 799 ("[B]ecause of problems of interference between broadcast signals," only "a finite number of frequencies"—"far exceeded by the number of persons wishing to broadcast"—"can be used productively."); see also *Turner Broad. Sys.* v. *FCC*, 512 U.S. 622, 637 (1994) ("The justification for our distinct approach to broadcast regulation rests upon the unique physical limitations of the broadcast medium."). In the Communications Act, Congress addressed those physical limits by exercising federal "control * * * over all the channels of radio transmission," 47 U.S.C. 301, and vesting in the FCC the responsibility for ensuring that access to broadcast spectrum is provided only in accordance with the "public interest." 47 U.S.C. 301, 309(a), 310(d); see also *NBC*, 319 U.S. at 214-215, 226.

As this Court has consistently held, the FCC's lawful exercise of its licensing authority does not violate the constitutional rights of those who are denied broadcast licenses, because the "right of free speech does not include * * * the right to use the facilities of radio without a license." *NBC*, 319 U.S. at 226-227; see *NCCB*, 436 U.S. at 799. Although there are today more broadcast and non-broadcast outlets than there were when the *NCCB* decision was rendered, it remains the case that "many more people would like access to [spectrum] than can be accommodated." Pet. App. 47a; see *Turner*, 512 U.S. at 637 (noting that there are "more would-be broadcasters than frequencies available in the electro-

magnetic spectrum"). The core reason for deferential review of the Commission's licensing policies therefore continues in force.[9]

Of course, as the Commission has found, the modern growth in media outlets is relevant to setting an appropriate limitation on common ownership as a matter of communications policy. For instance, the Commission concluded in this case that the presence of numerous competing media outlets in most markets warranted relaxation of the prior "blanket prophylactic ban on newspaper-broadcast combinations," Pet. App. 432a (Order ¶ 330); see also *id.* at 461a-464a (Order ¶¶ 365-367), and the court of appeals agreed in principle, see Pet. App. 40a-44a. The Commission's new cross-media rule takes account of those marketplace changes by permitting newspaper-broadcast combinations in markets with four or more television stations—markets in which 97% of the U.S. population reside—and eliminating cross-ownership restrictions entirely in large media markets (including the Tampa Bay market highlighted by Media General, see 04-1020 Pet. 5-6). The FCC's decision to ease ownership restrictions, however, does not suggest that deferential judicial review of those restrictions is no longer required.

2. Instead of grappling with this Court's controlling decisions in *NCCB* and *NBC*, petitioners focus their attack on the Court's

---

[9] Contrary to Media General's contention (04-1020 Pet. 12-13), this Court's settled analysis of broadcast regulation is entirely consistent with the Court's determination in *Turner* and *Reno* v. *ACLU*, 521 U.S. 844 (1997), not to apply the mode of analysis employed in *NBC* and *NCCB* to regulation of cable television and the Internet. As the Court explained, those other media do not present the same physical scarcity and interference concerns that necessitate governmental licensing of broadcast spectrum. See *Turner*, 512 U.S. at 639 ("given the rapid advances in fiber optics and digital compression technology," cable does not suffer from broadcasting's "inherent limitations," "[n]or is there any danger of physical interference between two cable speakers attempting to share the same channel."); *Reno*, 521 U.S. at 870 (noting that the Internet "can hardly be considered a 'scarce' expressive commodity" because "[i]t provides relatively unlimited, low-cost capacity for communications of all kinds.").

decision in *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367 (1969). In *Red Lion*, this Court considered whether the FCC's former "fairness doctrine," which required broadcasters to "give adequate coverage to public issues" that "accurately reflects * * * opposing views," violated broadcasters' First Amendment rights. *Id.* at 377. The Court recognized that the fairness doctrine imposed on broadcasters a duty to air views and opinions with which they may not have agreed. *Id.* at 392 (noting that the fairness doctrine prevented broadcasters from "communicat[ing] only their own views on public issues" and "permit[ting] on the air only those with whom they agreed."). The Court concluded, however, that "licensees given the privilege of using scarce radio frequencies" may be required "to share [their] frequenc[ies] with others" and to act as "prox[ies] or fiduciar[ies] with obligations to present those views and voices which are representative of [their] communit[ies]." *Id.* at 389, 394. *Red Lion* remains good law. See, *e.g.*, *McConnell* v. *FEC*, 540 U.S. 93, 237, 241 (2003) (citing *Red Lion*).

Petitioners contend that the FCC's own determination in 1987 that the scarcity of broadcast frequencies no longer justified retention of the fairness doctrine, see *In re Syracuse Peace Council*, 2 F.C.C.R. 5043 (1987), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990), calls into question the deferential review that courts have traditionally accorded the FCC's broadcast ownership rules. 04-1020 Pet. 19-20; 04-1036 Pet. 16-17; 04-1045 Pet. 26-27 n.17. There is no basis for that view. In repealing its fairness doctrine, the Commission determined that, in light of the development of new media outlets, spectrum scarcity in itself no longer justified the "intrusive type of content-based regulation" that the fairness doctrine imposed on broadcasters' editorial discretion. *Syracuse Peace Council*, 2 F.C.C.R. at 5054 ¶ 76; see *id.* at 5054 ¶ 72, 5068 nn.201-202. The Commission stressed, however, that "technological advancements * * * have not eliminated spectrum scarcity," *id.* at 5055 ¶ 78, and that its

analysis of the constitutionality of the fairness doctrine had no "relevance to the Commission's allocational and licensing function." *Id.* at 5069 n.204. Insofar as any doubt remained, the Commission later "ma[d]e clear that the dicta in *Syracuse Peace Council* regarding the appropriate level of First Amendment scrutiny has been rejected by Congress, this Commission, and the courts." *Repeal or Modification of the Personal Attack and Political Editorial Rules*, 15 F.C.C.R. 19,973, 19,979 ¶ 17 (2000); see *Radio-Television News Dirs. Ass'n* v. *FCC*, 229 F.3d 269 (D.C. Cir. 2000) (related reference). *Syracuse Peace Council* thus provides no support for petitioners' position. The physical limitations of the broadcast airwaves continue to justify the Communications Act's system for "allocat[ing] broadcast licenses in the 'public interest.'" *NCCB*, 436 U.S. at 795.[10]

Equally unconvincing is petitioners' contention that Congress has sent a "signal" that the FCC's ownership regulations should be subject to a higher level of scrutiny under the First Amendment. See 04-1036 Pet. 16 (quoting *League of Women Voters*, 468 U.S. at 376 n.11); 04-1045 Pet. 26-27 n.17. Congress has not in

---

[10] Contrary to Tribune's contention (04-1036 Pet. 15), the Commission's determination that relaxation of the prior newspaper-broadcast cross-ownership prohibition (and its proposed elimination in larger markets) can produce public interest benefits in terms of local news coverage does not affect the constitutional analysis of continued cross-media limits in small- and mid-sized markets. *NCCB* recognized that, in giving effect to the public interest, the Commission must balance the goal of promoting diversity of ownership with the "sometimes conflicting" public interest goal of ensuring "the best practicable service to the public." 436 U.S. at 782 (quoting *Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C.2d 393, 394 (1965)). The Communications Act does not require the Commission to give either policy "controlling weight in all circumstances," but leaves that "weighing of policies" under the public interest standard to the Commission's judgment "in the first instance." *Id.* at 810. In this case, the Commission balanced the public interest benefits from broadcaster/newspaper combinations against the significant increases in concentration that can result from such combinations in small to medium size markets. Pet. App. 528a-533a (Order ¶¶ 462-471).

relevant respects amended or repealed the provisions of the Communications Act that confer on the Commission the authority to regulate the distribution of broadcast licenses in the public interest (see pp. 2-3, *supra*), nor has it enacted any statute that directs reviewing courts to apply heightened scrutiny to the FCC's ownership regulations. Petitioners' suggestion of a congressional "signal" is particularly weak with respect to rules restricting cross-ownership of newspapers and broadcast stations: Between 1988 and 1996, Congress prohibited the FCC from making any changes to the former newspaper-broadcast cross-ownership prohibition,[11] and, notwithstanding the fact that Congress in the 1996 Act directed the FCC to modify or reevaluate several of its then-existing media ownership rules, it did not mention that prohibition at all.

3. There is no basis for Media General's argument (04-1020 Pet. 26-30) that, notwithstanding this Court's holding in *NCCB* that newspaper/television cross-ownership regulations "are not content related," 436 U.S. at 801, the broadcast ownership rules should be subject to heightened scrutiny as content-based restrictions on speech. The "principal inquiry in determining content

---

[11] See Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1989, Pub. L. No. 100-459, 102 Stat. 2216-2217; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-162, 103 Stat. 1020-1021; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1991, Pub. L. No. 101-515, 104 Stat. 2136; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1992, Pub. L. No. 102-140, 105 Stat. 797; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1993, Pub. L. No. 102-395, 106 Stat. 1846; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies Appropriations Act, 1994, Pub. L. No. 103-121, 107 Stat. 1166-1167; Departments of Commerce, Justice, and State, the Judiciary, and Related Agencies 1995 Appropriations and 1994 Supplemental Appropriations Act, 1995, Pub. L. No. 103-317, 108 Stat. 1738.

neutrality * * * is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward* v. *Rock Against Racism*, 491 U.S. 781, 791 (1989); cf. *Turner*, 512 U.S. at 643 ("[L]aws that confer benefits or impose burdens on speech without reference to the ideas or views expressed are in most instances content neutral."). This Court and lower courts have consistently and correctly regarded the FCC's broadcast ownership regulations as content-neutral, because the regulations do not turn on—and the FCC in applying the regulations does not examine—the content of any message an applicant for a broadcast license may seek to convey. *NCCB*, 436 U.S. at 801; *Fox*, 280 F.3d at 1046 (ownership regulations are "structur[al]," not "content-based"); see *NBC*, 319 U.S. at 226.

B. The Cross-Media Rule Does Not Violate The Due Process or Equal Protection Principles of the Fifth Amendment

Petitioners contend (04-1020 Pet. 23-25; 04-1036 Pet. 19-24) that the cross-media rule violates due process and equal protection principles because it limits cross-media combinations among daily newspapers, television stations, and radio stations, but not cable systems, Internet websites, and other information-delivery technologies. It is well established, however, that "the fact that a law singles out a certain medium" for different treatment does not by itself establish a constitutional concern. *Turner*, 512 U.S. at 660 (citing *Leathers* v. *Medlock*, 499 U.S. 439 (1991)). Such distinctions are permitted where "'justified by some special characteristic of' the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (quoting *Minneapolis Star & Tribune Co.* v. *Minnesota Comm'r of Rev.*, 460 U.S. 575, 585 (1983)).

Because daily newspapers, television stations, and radio stations are the "three media platforms that Americans turn to most often for local news and information," Pet. App. 520a (Order ¶ 452), the public interest goal of promoting diversity of ownership and viewpoint is more affected by consolidation among

broadcast stations and newspapers than by combinations involving other types of media. Focusing the cross-media rule on those media protects diversity while avoiding unnecessary regulation of other industries. Cf. *Turner*, 512 U.S. at 661 (given that non-cable video delivery systems do not present the "bottleneck" control or threat to the survival of broadcast television stations posed by cable systems, "[i]t should come as no surprise * * * that Congress decided to impose the must-carry obligation upon cable operators only").

There is no basis for Tribune's assertion (04-1036 Pet. 22-23) that the Third Circuit's equal protection holding conflicts with decisions of other courts of appeals. The Fourth and Ninth Circuit decisions that Tribune cites were both vacated by this Court, see 516 U.S. 415, 1155-1156 (1996), and, in any event, both of those circuits agreed with the Third Circuit's conclusion below that *NCCB* controlled the constitutional analysis of newspaper-broadcast cross-ownership restrictions. See *Chesapeake & Potomac Tel. Co.* v. *United States*, 42 F.3d 181, 191-192 (4th Cir. 1994); *U.S. West* v. *United States*, 48 F.3d 1092, 1098 (9th Cir. 1994). In *News American Pub'g, Inc.* v. *FCC*, 844 F.2d 800, 812 (D.C. Cir. 1988), it was critical to the court's analysis that the challenged prohibition was "structural only in form, as it applies to a closed class of one publisher broadcaster."

Petitioners' contention (04-1020 Pet. 24; 04-1036 Pet. 20-21) that the FCC was constitutionally required to apply the cross-media rule to cable systems and Internet websites ignores the particular characteristics of those media and the limitations of the record before the Commission. As the Commission explained below, its analysis of diversity focused on likely sources of *local* news and public affairs programming. Pet. App. 489a-490a (Order ¶ 406). The Commission did not treat cable systems or networks as a significant contributor to viewpoint diversity, because there was insufficient reliable record evidence on the extent to which consumers rely on cable television for such programming.

Id. at 494a-495a (Order ¶ 414). See *NCCB*, 436 U.S. at 815 (upholding divestiture of newspaper-broadcast combinations in small markets on the basis that other forms of media did not make similar contributions to viewpoint diversity in local markets). With respect to the Internet, it would have made little sense to apply the cross-media rule to that medium; although the Commission originally concluded (in findings set aside below) that the Internet contributes to diversity in local markets, the Internet is not itself "owned"—or otherwise controlled—by any single party, and the multiplicity of Internet outlets would make it virtually impossible to develop a meaningful or workable cross-ownership rule in that context.

III. SECTION 202(h) DOES NOT IMPAIR THE COMMISSION'S AUTHORITY TO ADOPT AND REVISE ITS OWNERSHIP RULES

1. The Third Circuit correctly rejected NAB's argument (see 04-1033 Pet. 19-25) that the FCC's decision to revise the definition of radio markets and to count Joint Sales Agreements as broadcast interests violated the 1996 Act because those changes had the effect of making the local radio ownership rule more restrictive. Pet. App. 34a; see *id.* at 124a n.98 (Scirica, J., dissenting). The FCC's broad powers under the Communications Act to advance the public interest have traditionally included the power to impose additional restrictions on media ownership. See *NCCB*, 436 U.S. at 780-781. As the court of appeals correctly observed, "Congress gave no express indication [in the 1996 Act] that it intended to restrict the Commission's rulemaking authority" to adopt such restrictions where supported by the agency record. Pet. App. 34a n.18 (citing *American Hosp. Ass'n* v. *NLRB*, 499 U.S. 606, 613 (1991) ("[I]f Congress had intended to curtail in a particular area the broad rulemaking authority [it has] granted[,] * * * we would have expected it to do so in language expressly describing an exception [to that authority].")); see *id.* at 124a (Scirica, C.J.,

dissenting) (stating that the 1996 Act "does not foreclose the possibility of increased regulation under the biennial review if the Commission finds such action in the public interest").

Contrary to the contentions of NAB and Clear Channel (04-1033 Pet. 20-21; Clear Channel Br. 21), Congress's decision to set the permissible levels of common ownership in Section 202(a) of the 1996 Act does not constrain the FCC's authority to regulate broadcast ownership in the public interest. See Pet. App. 34a. Indeed, Section 202(h) of the same statute expressly directs the FCC to determine whether to "repeal *or modify*" ownership rules that may no longer promote the public interest. 110 Stat. 112 (emphasis added). As the court of appeals recognized (Pet. App. 34a), Congress's use of the term "modify," in conjunction with the continued emphasis on the "public interest" in Section 202(h), refutes the argument that Congress intended through Section 202(a) to effectuate a drastic reduction in the scope of the FCC's traditional licensing authority. Rather, the 1996 Act's congressionally specified revisions to the Commission's rules—including those to the radio ownership rules—"determined only the starting point from which the Commission was to assess the need for further change." *Fox*, 280 F.3d at 1043.

2. Contrary to petitioners' suggestion (04-1033 Pet. 24, 29; 04-1036 Pet. 25; 04-1045 Pet. 19-20; see Clear Channel Br. 24-26), the Third Circuit's interpretation of Section 202(h) in this case does not conflict with the D.C. Circuit's decisions in *Fox* and *Sinclair*. In *Fox*, the D.C. Circuit interpreted Section 202(h) to require the Commission, if it decides to retain a particular ownership rule, to provide an adequate explanation for its decision. See 280 F.3d at 1042, 1044. Likewise, the court in *Sinclair* concluded that the Commission "has wide discretion to determine where to draw administrative lines," 284 F.3d at 162 (internal quotation marks omitted), but that the Commission must "provide a reasoned explanation for its action," *ibid.* In stating that the Commission's decision to retain, modify, or repeal an ownership rule must

be supported by a "reasoned analysis," the Third Circuit articulated essentially the same standard in this case. See Pet. App. 34a-36a. And as the Third Circuit recognized, the D.C. Circuit has now made clear that Congress's direction that the Commission retain only those rules that are "necessary in the public interest" means only that a retained rule must be useful in serving the public interest. Pet. App. 30a-33a (discussing *Cellco P'ship* v. *FCC*, 357 F.3d 88, 98 (D.C. Cir. 2004)).[12]

IV. THE CONDITIONAL CROSS-PETITION IN NO. 04-1177 SHOULD BE DENIED

For the most part, Sinclair's cross-petition in No. 04-1177 reiterates arguments that are presented in the petitions filed in Nos. 04-1033, 04-1036, and 04-1045.[13] Although none of those arguments merits this Court's review, if the Court decides to address them, it may do so by granting one or more of the petitions in this case. There is no reason—and Sinclair offers none—why the Court should also grant a duplicative conditional cross-

---

[12] Tribune's suggestion (04-1036 Pet. 25) that Section 202(h) eliminated the Third Circuit's authority to stay the revised rules is without merit. A court retains the authority to grant or withhold equitable remedies "[u]nless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity." *Weinberger* v. *Romero-Barcelo*, 456 U.S. 305, 313 (1982) (quoting *Porter* v. *Warner Holding Co.*, 328 U.S. 395, 398 (1946)). Section 202(h) does not contain any such restriction on the equitable authority of the courts.

[13] There is no basis for Sinclair's contention (04-1177 Cross-Pet. 9) that the Third Circuit's decision in this case "overrule[s]" the D.C. Circuit's decision in *Sinclair*. The *Sinclair* court concluded that the FCC had not provided an adequate explanation for limiting "voices" under the local television rule to television broadcasters. The Third Circuit below reviewed a different version of the local television rule in which the number of voices is no longer a factor and, therefore, did not consider the types of media that should count as "voices" under that rule.

petition that does not substantively add to the petitions already before the Court.

Nor should the Court entertain Sinclair's argument (04-1177 Cross-Pet. 14-16) that the local television ownership rule unconstitutionally "singles out" television broadcasters—an argument that is not otherwise presented in the petitions before the Court. The question whether television broadcasters have been singled out in violation of the First Amendment was not presented to the court of appeals by any party. Consequently, there is no decision of the court of appeals on that issue for this Court to review. See *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212-213 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them.") (citations omitted).

Sinclair's argument that the local television ownership rule violates the First Amendment is in any event without merit. A regulation may "single[] out a certain medium" without violating the First Amendment if the regulation is "justified by some special characteristic of the particular medium being regulated." *Turner*, 512 U.S. at 660-661 (internal quotation marks omitted). Although, as Sinclair notes (04-1177 Cross-Pet. 15), the FCC concluded that viewers generally consider television broadcasting and cable networks to be "good alternatives for one another" in the market for delivered video programming (Pet. App. 298a-299a (Order ¶ 143)), it also found that, because cable networks typically offer programming on a nationwide basis, they "may respond differently [from television stations] to changes in local market concentration." *Id.* at 299a (Order ¶ 145). The FCC thus reasonably concluded that it should "focus on ownership of television broadcast stations, not cable networks, to promote competition in local television markets." *Id.* at 300a.

CONCLUSION

The petitions and cross-petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

AUSTIN C. SCHLICK
Acting General Counsel
DANIEL M. ARMSTRONG
JACOB M. LEWIS
Associate General Counsel
NANDAN M. JOSHI
Counsel
Federal Communications Commission

MAY 2005

Supreme Court, U.S.
FILED
MAY 2 - 2005
OFFICE OF THE CLERK

(5) (4) (5) (3) (3) (3)

Nos. 04-1020, 04-1033, 04-1036, 04-1045, 04-1168, and 04-1177

In the Supreme Court of the United States

MEDIA GENERAL, INC., *Petitioner,*

v.

FEDERAL COMMUNICATIONS COMMISSION AND UNITED STATES OF AMERICA, *Respondents*

ON PETITIONS AND CROSS-PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION FOR PUBLIC INTEREST RESPONDENTS

ANGELA J. CAMPBELL
KAREN HENEIN
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Suite 312
Washington, DC 20001
(202) 662-9535
Counsel for Media Alliance and Office of Communication of the United Church of Christ, Inc.

ANDREW JAY SCHWARTZMAN*
MEDIA ACCESS PROJECT
1625 K Street, NW, Suite 1000
Washington, DC 20006
(202) 232-4300
Counsel for Prometheus Radio Project, Fairness and Accuracy in Reporting, and Center for Digital Democracy

GLENN B. MANISHIN
KELLEY DRYE & WARREN, LLP
8000 Towers Crescent Drive #1200
Vienna, VA 22812
(703) 918-2322
Counsel for Consumer Federation of America and Consumers Union

May 2, 2005

*Counsel of Record

[Additional Counsel Listed on Inside Cover]

SHELBY D. GREEN
PACE UNIVERSITY SCHOOL OF LAW
78 No. Broadway
White Plains, NY 10603
(914) 422-4421
Counsel for National Council of the Churches of Christ in the United States

DAVID HONIG
NICOLAINE LAZARRE
MINORITY MEDIA & TELECOMMUNICATIONS COUNCIL
3636 16th St. NW, #B-366
Washington, DC, 20010
(202) 332-7005
Counsel for American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., and Women's Institute for Freedom of the Press

QUESTIONS PRESENTED

1. Whether this Court should overrule its long-settled holdings in *Red Lion Broadcasting v. FCC* and *FCC v. National Citizens Committee for Broadcasting* that broadcast regulations receive rational basis review under the First Amendment, that newspaper-broadcast cross-ownership regulations do not impermissibly discriminate in violation of the First or Fifth Amendment, and that newspaper-broadcast cross-ownership regulations are content-neutral.

2. Whether the court of appeals' interpretation of §202(h) of the 1996 Telecommunications Act accords with the decisions of the only other court of appeals to have considered the issue.

3. Whether the court of appeals properly remanded for justification or modification certain aspects of the Federal Communications Commission's 2002 Biennial Regulatory Review Order that were not supported by the record or that lacked reasoned analysis.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, Public Interest Respondents state as follows:

Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and National Council of the Churches of Christ in the United States have no parent companies or publicly-issued stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i
CORPORATE DISCLOSURE STATEMENT ii
TABLE OF AUTHORITIES v
STATEMENT 1
REASONS TO DENY THE WRIT 2
I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT 3
A. Petitioners Have Presented No Compelling Reason to Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations 4
1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach To Broadcast Regulation 4
2. Spectrum Scarcity Continues To Exist As A Matter Of Fact 8
3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine 9
B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding 11
C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral 15

D. Should The Court Wish to Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues 16

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT 17

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION.. 21

CONCLUSION 25

TABLE OF AUTHORITIES

Cases

Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995) 10

Adventure Communications, Inc. v. Kentucky Registry of Election Fin., 191 F.3d 429 (4th Cir. 1999) 10

American Family Ass'n, Inc. v. FCC, 365 F.3d 1156 (D.C. Cir. 2004) 8, 10, 11, 15, 16

Beach Television Partners, In re, 38 F.3d 535 (11th Cir. 1994) 10

Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968) 10

Bunting v. Mellen, 541 U.S. 1019, 124 S.Ct. 1750 (2004) ... 10

Cellco P'ship v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 18, 19, 20

Chesapeake & Potomac Tel. Co. v. United States, 42 F.3d 181 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam) 14

Chicago Cable Communications v. Chicago Cable Comm'n, 879 F.2d 1540 (7th Cir. 1989) 10

Cmty. Communications Co., Inc. v. City of Boulder, Colo., 660 F.2d 1370 (10th Cir. 1981) 10

FCC v. League of Women Voters of California, 468 U.S. 364 (1984) 4, 5, 14

FCC v. National Citizens Comm. for Broad., 436 U.S. 775 (1978) ..... *passim*

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027, *modified on rehearing*, 293 F.3d 537 (D.C. Cir. 2002) 8, 14, 19, 20

Free Speech ex rel. Ruggiero v. Reno, 200 F.3d 63 (2d Cir. 1999) (per curiam) 9, 10

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271 (1949) 24

Grid Radio v. FCC, 278 F.3d 1314 (D.C. Cir. 2002) 9

Grosjean v. American Press Co., 297 U.S. 233 (1936) 14

Mark v. FCC, 468 F.2d 266 (1st Cir. 1972) 10

McConnell v. Federal Election Comm'n, 540 U.S. 93 (2003) 4

Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Revenue, 460 U.S. 575 (1983) 14

Missouri v. Jenkins, 515 U.S. 70 (1995) 24

Muir v. Alabama Educ. Television Comm'n, 688 F.2d 1033 (5th Cir. 1982) 10

Nat'l Broad. Co., Inc. v. United States, 319 U.S. 190 (1943) 4

Nat'l Collegiate Athletic Ass'n v. Smith, 525 U.S. 459 (1999) 15

Prayze FM v. FCC, 214 F.3d 245 (2d Cir. 2000) 9

Radio-Television News Dir. Ass'n v. FCC, 184 F.3d 872 (D.C. Cir. 1999) 11

Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969) ..... *passim*

Ruggiero v. FCC, 317 F.3d 239 (D.C. Cir. 2003) 9, 15

Scott v. Rosenberg, 702 F.2d 1263 (9th Cir. 1983) 10

Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) 8, 19, 20, 24

State Oil v. Khan, 522 U.S. 3 (1997) 4

Syracuse Peace Council v. FCC, 867 F.2d 654 (D.C. Cir. 1989) 10

Telecomm. Research & Action Ctr. v. FCC, 801 F.2d 501 (D.C. Cir. 1986) 11

Time Warner Entertainment Co. v. FCC, 105 F.3d 723 (D.C. Cir. 1997) 10

Time Warner Entertainment Co. v. United States, 211 F.3d 1313 (D.C. Cir. 2000) 16

Tribune Co. v. FCC, 133 F.3d 61 (D.C. Cir. 1988) 11

Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622 (1994) 13, 16

United States v. Any and All Radio Station Transmission Equip., 218 F.3d 543 (6th Cir. 2000) 9

United States v. Any and All Radio Station Transmission Equip., 207 F.3d 458 (8th Cir. 2000) 9

United States v. Dunifer, 219 F.3d 1004 (9th Cir. 2000) 9

United States v. Mead Corp., 533 U.S. 218 (2001) 18, 20

United States v. Szoka, 260 F.3d 516 (6th Cir. 2001) 10

US West, Inc. v. United States, 48 F.3d 1092 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996) 14

Ward v. Rock Against Racism, 491 U.S. 781 (1989) 15

Statutes

47 U.S.C. § 336 6

Balanced Budget Act, Pub. L. No. 105-33, 111 Stat. 251 (1997) 6

Children's Television Act of 1990, Pub. L. No. 101-437, 104 Stat. 996 (1990) 5, 6

Consolidated Appropriations Act, Pub. L. No. 108-199, 118 Stat. 3 (2004) 7

Department of Commerce and Related Agencies Appropriations of 2001, H.R. 5548, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000) 7

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996) 6, 18

§ 11 ..... 19, 20

§ 201(a) 6

§ 202(b) 20
§ 202(h) 18, 19, 20, 21

Legislative Authorities

H.R. Rep. No. 101-385 6
H.R. Rep. No. 105-149 ..... 6, 7

Administrative Authorities

2002 Biennial Regulatory Review, Report & Order and Notice of Proposed Rulemaking, 18 F.C.C.R. 13620 (2003) ..... *passim*

Rules Relating to Multiple Ownership of Standard, FM, and Television Broadcast Stations, Second Report & Order, 50 F.C.C.2d 1046 (1975), *vacated in part, KCMC, Inc. v. FCC*, 600 F.2d 546 (5th Cir. 1979) 11, 12

Miscellaneous

Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004) 17

Media General Opposition to Petition to Deny (Dec. 14, 2004) 17

Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004) 17

Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004) 17

Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003) 6, 7

News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004) 7

Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000) 7

Supreme Court Rule 10 ..... 3, 22

STATEMENT

Public Interest Respondents[1] generally adopt the statement of the United States in this case, and write separately to underscore two additional points.

1. The court of appeals upheld much of the FCC's 2002 Biennial Regulatory Review Order ("*2002 Biennial*"). Pet. App. 1a-190a.[2] The court's comprehensive opinion properly notes that the scope of judicial review of federal agency action is "narrow" and that it is only authorized to remand an agency decision when "it is not supported by substantial evidence, or the agency has made a clear error in judgment." *Id.* at 25a (internal citations omitted). For example, the court upheld the FCC's decisions to relax its cross-ownership ban, *id.* at 40a, to retain the "top four" restriction on ownership of local television stations, *id.* at 72a, to revise its definition of local radio markets, *id.* at 85a, and to count "joint sales agreements" toward a radio station's permissible ownership total, *id.* at 96a.

2. The court of appeals was unanimous in its disposition of many key arguments raised by Petitioners and Cross-

---

[1] Public Interest Respondents are Prometheus Radio Project, Fairness and Accuracy in Reporting, Center for Digital Democracy, Media Alliance, Office of Communication of the United Church of Christ, Inc., Consumer Federation of America, Consumers Union, American Hispanic Owned Radio Association, Civil Rights Forum on Communications Policy, League of United Latin American Citizens, Minority Business Enterprise Legal Defense and Education Fund, Minority Media and Telecommunications Council, National Asian American Telecommunications Association, National Association of Latino Independent Producers, National Coalition of Hispanic Organizations, National Council of La Raza, National Hispanic Media Coalition, National Indian Telecommunications Institute, National Urban League, Native American Public Telecommunications, Inc., PRLDEF—Institute for Puerto Rican Policy, Unity: Journalists of Color, Inc., Women's Institute for Freedom of the Press, and the National Council of the Churches of Christ in the United States.

[2] References are to the appendix filed by Petitioner in 04-1020.

Petitioners. The court unanimously rejected all of the constitutional challenges raised by Petitioners. *See* Pet. App. 107a. Chief Judge Scirica agreed with the majority on the proper legal standards for review of agency decisions, *compare id.* at 24a-26a, *with id.* at 116a-118a, but came to a different conclusion as to the application of those standards to certain specific rules.

REASONS TO DENY THE WRIT

Review by this Court would be premature. The court of appeals neither forbade nor compelled the implementation of specific rules; it simply remanded those rules that were without factual record support or rational agency explanation. Because many rules challenged by Petitioners are not expected to be retained on remand, review of those rules would likely be unnecessary. Further, all of the rules at issue in this case may be modified or repealed by the FCC during the next congressionally-mandated review of media ownership rules, which the FCC will conduct in 2006. This Court should not expend its scarce judicial resources to pass on specific rules that may be repealed or modified by the time its decision is issued.

More importantly, despite the voluminous record below, the proceeding did not focus on the core issue raised by many Petitioners—whether spectrum scarcity continues to exist. Accordingly, even assuming this Court should wish to revisit this fact-dependent question, this case would be a poor vehicle through which to do so.

Nor does this case present any broad, unsettled issues of law for this Court to review. The court below did not announce any new principle of constitutional law; it simply applied doctrine that has been clearly established by this Court. Petitioners present no valid reason for this Court to overrule this precedent. Further, the Third Circuit's interpretation of the relevant statute's standard of review provision is in com-

plete harmony with the explanation of the only other court of appeals to have considered it.

Stripped of its constitutional and statutory rhetoric, this case is simply about the application of properly articulated administrative law principles to a complex factual record. Such case-specific issues do not warrant this Court's intervention. Sup. Ct. R. 10.

I. PETITIONERS HAVE NOT DEMONSTRATED ANY COMPELLING REASON TO OVERRULE LONGSTANDING PRECEDENT

The appropriate standard of review for assessing the constitutionality of the FCC's broadcast ownership rules was decided by this Court in *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978) ("*NCCB*"). The court of appeals properly applied the standards established in *NCCB* to this case. Essentially conceding this point, three Petitioners nonetheless urge this Court to reconsider and overrule *NCCB*.

In *NCCB*, newspaper and broadcast station owners challenged the FCC's then recently adopted newspaper-broadcast cross-ownership rule, which was much more restrictive than the rules at issue in this case. The Court rejected the argument that the cross-ownership rule violated the First Amendment, finding that the argument "ignore[d] the fundamental proposition that there is no 'unabridgeable First Amendment right to broadcast comparable to the right of every individual to speak, write, or publish.'" 436 U.S. at 799 (citing *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 388 (1969)). The Court observed that the "physical limitations of the broadcast spectrum are well known" and that the number of frequencies used for broadcasting "is far exceeded by the number of persons wishing to broadcast to the public." 436 U.S. at 799.

This Court has repeatedly emphasized that the reconsideration of previous decisions should be approached with the utmost caution. *See, e.g.*, *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). Indeed, just last term, this Court explicitly relied on *Red Lion* in upholding an important provision of the Bipartisan Campaign Reform Act of 2002. *McConnell v. Federal Election Comm'n*, 540 U.S. 93, 237 (2003). Because, as shown below, Petitioners present no compelling reason for this Court to reconsider its prior decisions, the Court should deny certiorari.

A. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Holding That Rational Basis Is The Appropriate Standard For Review Of Broadcast Regulations

As far back as 1943, this Court rejected a constitutional challenge brought by the broadcast networks against an FCC ownership rule known as the "chain broadcasting rule." The Court recognized that "[u]nlike other modes of expression, radio inherently is not available to all. That is its unique characteristic, and that is why, unlike other modes of expression, it is subject to governmental regulation." *Nat'l Broad. Co., Inc. v. United States*, 319 U.S. 190, 226 (1943). Subsequently, in *Red Lion*, the Court explained that "in view of the limited number of available broadcasting frequencies," it did not violate the First Amendment for the FCC to require broadcasters to serve the public interest by providing certain types of programming. 395 U.S. at 394 (internal quotations omitted).

1. Neither Congress Nor The FCC Have Signaled That This Court Should Reconsider Its Approach to Broadcast Regulation

In *FCC v. League of Women Voters of California*, the Court concluded that "[w]e are not prepared . . . to reconsider our longstanding approach [of *Red Lion*] without some signal

from Congress or the FCC that technological developments have advanced so far that some revision of the system of broadcast regulation may be required." 468 U.S. 364, 376 n.11 (1984). This signal has not been given.

a. In this very proceeding, the FCC reaffirmed its support for the scarcity doctrine. Responding to arguments made by two of the present Petitioners, the FCC stated:

> We disagree with Media General and Tribune, who argue that our ownership rules affecting newspapers should be judged under strict scrutiny First Amendment analysis. Media General and Tribune claim that spectrum scarcity is no longer a valid rationale for media ownership limits . . . . [T]he courts have considered and consistently rejected the arguments for a stricter standard of First Amendment scrutiny of broadcast regulation made by commenters here. Accordingly, the rational basis test continues to apply to our ownership rules.

Pet. App. 218a (*2002 Biennial* ¶15). As this makes evident, the FCC is clearly not "signaling" this Court to reconsider the scarcity doctrine.

b. Nor has Congress indicated a desire for the Court to reconsider the scarcity doctrine. To the contrary, Congress has enacted numerous laws imposing public interest requirements premised on the continued existence of scarcity, and in some cases, reinforcing that scarcity.

For example, in the Children's Television Act of 1990, Congress explicitly found that as part of television stations' obligations to serve the public interest, stations should provide programming serving the special needs of children. Congress therefore directed the FCC to consider in renewing television licenses the extent to which the licensee has served the educational and informational needs of children. Chil-

dren's Television Act of 1990, Pub. L. No. 101-437, §§ 101(2), 103(a), 104 Stat. 996, *codified in part at* 47 U.S.C. § 303(a). *See also* H.R. Rep. No. 101-385 at 8 (citing *Red Lion* and rejecting suggestions of constitutional difficulties with Act).

In 1996, Congress added a new section to the Communications Act to establish a framework for the transition from analog to digital television. Telecommunications Act of 1996, Pub. L. No. 104-104, § 201(a), 110 Stat. 56 (1996), *codified at* 47 U.S.C. § 336 ("1996 Act"). Although this transition offered the opportunity for awarding additional broadcast licenses, Congress opted instead to limit eligibility for digital television licenses to the existing licensees. 47 U.S.C. § 336(a)(1). At the same time, Congress reaffirmed that television licensees were expected to continue to meet their obligation to serve the public interest. *Id.* at § 336(d). Thus, if anything, the 1996 Act actually increased scarcity by declining to make this spectrum available to new licensees.[3]

In 1997, Congress directed that the FCC utilize auctions to award all new commercial broadcast licenses, shifting away from a "comparative hearing" process whereby the FCC evaluated each applicant before awarding a license. Balanced Budget Act, Pub. L. No. 105-33, § 3301, 111 Stat. 251 (1997). This action was intended to address the inefficiencies of the hearing process that stemmed from the growing number of applications for new broadcast licenses. H.R. Rep. No. 105-149 at 558; *see also* Karl M. Manheim & Lawrence B. Solum, *An Economic Analysis of Domain Name Policy*, 25 Hastings Comm. & Ent. L.J. 359, 439 (2003). In-

---

[3] Tribune claims that Congress' requirement that the FCC redistribute spectrum after the digital television transition is complete demonstrates that it no longer believes the spectrum is scarce. 04-1036 Pet. 17. In fact, this leads to the opposite conclusion—if there were not more would-be users than available frequencies, Congress would have no reason to re-apportion the spectrum.

deed, the Balanced Budget Act relied upon spectrum scarcity in requiring that minimum amounts be raised by each auction. H.R. Rep. No. 105-149 at 569-72 (setting minimum amounts "[i]n recognition of the scarcity (and hence, the value) of spectrum"). Both the use of auctions and the high prices they generate[4] demonstrate that there continue to be far more would-be broadcasters than can be accommodated by the broadcast spectrum.

In 2000, Congress actually rolled back an FCC attempt to award additional broadcast licenses through the creation of a new, noncommercial low power FM radio service. A provision in the Department of Commerce and Related Agencies Appropriations Act of 2001 limited the number of low-power radio applications that the FCC could grant, due to concerns that allowing more radio stations on the air would interfere with existing broadcast stations. H.R. 5548 § 632, *enacted by* H.R. 4942, Pub. L. No. 106-553, 114 Stat. 2762 (2000).

And finally, in early 2004, Congress passed legislation rolling back the FCC's relaxation of the national television audience limits. Consolidated Appropriations Act of 2004, Pub. L. No. 108-199, § 629, 118 Stat. 3 (2004). As part of the *2002 Biennial*, the FCC increased the percentage of the national television audience that one company could "reach" from 35% to 45%. Congress overruled the FCC's decision

---

[4] For example, the FCC's first ever open auction of the FM broadcast spectrum saw over 450 bidders participate, and resulted in 110 winning bidders paying nearly $150 million for a portion of the spectrum. News Release, FCC Announces Close to Unprecedented FM Auction (Nov. 24, 2004). The FCC noted that this auction "signifie[d] the continuing strong demand for radio broadcast spectrum." *Id.* In another example, eleven bidders vied for a single television station license in Blanco, TX; the winning bid approached $19 million. Public Notice, Blanco, Texas Broadcast Auction No. 80 Closes (July 18, 2000). One reason for the high prices generated by spectrum auctions is that "very few 'new' broadcast licenses are issued these days," a fact that is "the consequence of spectrum scarcity." Manheim & Solum, *supra*, at 441.

and rolled the cap back to 39%. If Congress did not believe that the spectrum was "scarce," it would have no reason to cap permissible ownership. As the D.C. Circuit explained, "[i]n the face of [the limited capacity of the spectrum], the national ownership cap increases the number of different voices heard in the nation . . . . But for the scarcity rationale, that increase would be of no moment." *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1046, *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002).

2. Spectrum Scarcity Continues To Exist As A Matter Of Fact

Various Petitioners nonetheless argue that this Court should reconsider *NCCB* and *Red Lion* because the factual predicate of the scarcity doctrine has been eroded by the development of cable television, direct broadcast satellites, and the internet. 04-1020 Pet. 10-11, 04-1036 Pet. 16, 04-1045 Pet. 26. But, as the court of appeals correctly recognized, "[t]he abundance of non-broadcast media does not render the broadcast spectrum any less scarce." Pet. App. 47a. Nor is there any conflict among the Circuits on this point. The D.C. Circuit recently rejected the same argument, noting that the "protest that *NCCB* [and the scarcity doctrine] is no longer controlling because it is undermined by the advent of cable television, DBS, and the internet, is to no avail." *Sinclair Broad. Group, Inc. v. FCC*, 284 F.3d 148, 168-69 (D.C. Cir. 2002) (internal quotations and citations omitted); *see also American Family Ass'n, Inc. v. FCC*, 365 F.3d 1156, 1169 (D.C. Cir. 2004) (noting that the number of frequencies that can be productively used "is far exceeded by the number of persons wishing to broadcast").

Further evidence that there continue to be more would-be broadcasters than frequencies available for licensing is demonstrated by the large number of unlicensed broadcast stations that have been shut down by the FCC in recent

years.[5] Likewise, Media General's contention (04-1020 Pet. 12-13) that the scarcity doctrine has been undermined because this Court has not extended the doctrine to cable or internet regulations misses the point. As the *Red Lion*'s scarcity doctrine is based on the unique physical characteristics of the broadcast spectrum, the fact that the doctrine has not been extended beyond the broadcast arena in no way undercuts its viability in the broadcast arena. Spectrum scarcity exists today in the same form that it did when this Court first recognized the doctrine more than a half-century ago.[6] Further review of this factual question, which was not addressed by the FCC or the court of appeals and barely raised in the huge administrative record, is unwarranted.

3. There Is No Conflict Among The Circuits Regarding The Scarcity Doctrine

Contrary to many Petitioners' contentions, there is no conflicting authority among the courts of appeals regarding the scarcity doctrine or the appropriate level of scrutiny for broadcast regulations. Every Circuit has recognized that broadcasting regulation is subject to more deferential review

---

[5] *See, e.g., Ruggiero v. FCC*, 317 F.3d 239, 242 (D.C. Cir. 2003); *Grid Radio v. FCC*, 278 F.3d 1314, 1316 (D.C. Cir. 2002); *Prayze FM v. FCC*, 214 F.3d 245, 250 (2d Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 218 F.3d 543, 549-50 (6th Cir. 2000); *United States v. Any and All Radio Station Transmission Equip.*, 207 F.3d 458, 459 (8th Cir. 2000); *United States v. Dunifer*, 219 F.3d 1004, 1005 (9th Cir. 2000); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam).

[6] Media General claims (04-1020 Pet. 22) that because modern technology has increased the amount of spectrum available for use, scarcity no longer exists. This is not the case. *Red Lion*'s observation that "[a]dvances in technology . . . have led to more efficient utilization of the frequency spectrum, but uses for the spectrum have also grown apace," 395 U.S. at 396-97, remains true today with the tremendous growth in cellular telephone service and other wireless services.

under the First Amendment due to the fact that more people wish to broadcast than the spectrum can accommodate.[7]

Tribune contends (04-1036 Pet. 13) that the Third Circuit's suggestion that it would endorse the scarcity doctrine "[e]ven were [it] not constrained by Supreme Court precedent," Pet. App. 47a, somehow creates a conflict with the D.C. Circuit. This is not so. While comments critical of the scarcity doctrine have sometimes appeared in dissenting or concurring opinions of the D.C. Circuit, *see, e.g.*, *Time Warner Entertainment Co. v. FCC*, 105 F.3d 723, 724 n.2 (D.C. Cir. 1997) (dissent from denial of rehearing en banc); *Action for Children's Television v. FCC*, 58 F.3d 654, 675 (D.C. Cir. 1995) ("*ACT*") (Edwards, C.J., dissenting); *Syracuse Peace Council v. FCC*, 867 F.2d 654, 682-83 (D.C. Cir. 1989) (Starr, J., concurring), such comments are dicta, and conflicts involving dicta do not merit certiorari. *See, e.g.*, *Bunting v. Mellen*, 541 U.S. 1019, 124 S.Ct. 1750, 1754 (2004). Recognizing that *Red Lion* continues to "rule the

---

[7] For example, the D.C. Circuit recently reviewed the FCC's system for awarding non-commercial educational broadcast licenses and held that the scheme was subject to deferential review under the First Amendment. It concluded that "[r]egulation of some form is an irreducible feature of any broadcast spectrum worth having, since 'a finite number of frequencies can be used productively; this number is far exceeded by the number of persons wishing to broadcast to the public.'" *American Family Ass'n*, 365 F.3d at 1169 (quoting *NCCB*, 436 U.S. at 798). *See also Mark v. FCC*, 468 F.2d 266, 269 (1st Cir. 1972); *Free Speech ex rel. Ruggiero v. Reno*, 200 F.3d 63, 64 (2d Cir. 1999) (per curiam); *Adventure Communications, Inc. v. Kentucky Registry of Election Fin.*, 191 F.3d 429, 439-40 (4th Cir 1999); *Muir v. Alabama Educ. Television Comm'n*, 688 F.2d 1033, 1039, 1043 (5th Cir. 1982); *United States v. Szoka*, 260 F.3d 516, 526 (6th Cir. 2001); *Chicago Cable Communications v. Chicago Cable Comm'n*, 879 F.2d 1540, 1548 (7th Cir. 1989); *Black Hills Video Corp. v. FCC*, 399 F.2d 65, 69 (8th Cir. 1968); *Scott v. Rosenberg*, 702 F.2d 1263, 1272 (9th Cir.1983); *Cmty. Communications Co., Inc. v. City of Boulder, Colo.*, 660 F.2d 1370, 1376 n.5 (10th Cir. 1981); *In re Beach Television Partners*, 38 F.3d 535, 536 (11th Cir. 1994).

broadcast jungle," *Tribune Co. v. FCC*, 133 F.3d 61, 69 (D.C. Cir. 1988), the D.C. Circuit has consistently and properly applied the scarcity doctrine. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1168; *Radio-Television News Dir. Ass'n v. FCC*, 184 F.3d 872, 877 n.3 (D.C. Cir. 1999) ("*RTNDA*"); *Telecomm. Research & Action Ctr. v. FCC*, 801 F.2d 501, 509 (D.C. Cir. 1986) ("*TRAC*"). Thus there is simply no conflict for this Court to review.

B. Petitioners Have Presented No Compelling Reason To Revisit *NCCB*'s Equal Protection Holding

Certain Petitioners also challenge the court of appeals' decision that rules barring newspapers from owning broadcast stations do not impermissibly discriminate in violation of the First or Fifth Amendment. As with the scarcity doctrine, this Court has already addressed this issue. In *NCCB*, the Court upheld a ban on newspaper-broadcast cross-ownership against an equal protection challenge, finding the regulations to be a "reasonable means" of promoting the FCC's objectives. 436 U.S. at 801-02. Indeed, even Media General acknowledges (04-1020 Pet. 24) that the *NCCB* Court rejected the argument that the cross-ownership regulations unfairly single out newspaper owners.

1. Nonetheless, Media General and Tribune argue that this Court should reconsider *NCCB* because "in *NCCB's* day, the only other 'major media of mass communications' besides newspapers were broadcast television and radio," while today other forms of mass media such as cable and internet are available. 04-1020 Pet. 24; *see also* 04-1036 Pet. 20. This misreads *NCCB*. The cross-ownership rule at issue in *NCCB* was not intended to diversify all major media of mass communication; rather, the FCC sought to regulate media cross-ownership to promote diversity of viewpoints within local communities. 436 U.S. at 786 (citing *Rules Relating to Multiple Ownership of Standard, FM, and Television Broad-*

cast Stations, Second Report & Order, 50 F.C.C.2d 1046, 1075 (1975) ("*1975 Order*")). The FCC excluded certain types of mass media, such as magazines and other periodicals that "dealt exclusively with regional or national issues and ignored local issues." *1975 Order*, 50 F.C.C.2d at 1080 ¶112; *see also NCCB*, 436 U.S. at 787 n.10. Thus, in 1975, the FCC recognized that other major mass media existed, but chose to restrict common ownership of only those media that covered local issues—specifically newspapers, broadcast television, and broadcast radio.

Similarly, in the *2002 Biennial,* the FCC sought to "preserv[e] viewpoint diversity among local, not national, news sources." Pet. App. 484a-485a (*2002 Biennial* ¶399). Thus, the FCC excluded "the large number of *national* news sources such as all-news cable channels and the news sources on the Internet." *Id.* (emphasis added). Finding that "broadcast television, daily newspapers, and broadcast radio" continue to be "the three media platforms that Americans turn to most often for local news and information," *id.* at 520a (*2002 Biennial* ¶452), the FCC appropriately limited the cross-media limits to the media that are the most significant sources of local news.

Petitioners Newspaper Association of America, Belo Corp., Gannett Co., Inc., and Morris Communications Company, LLC ("NAA") (04-1045 Pet. 27), along with Media General (04-1020 Pet. 25), also claim that the specific cross-ownership regulations adopted in the *2002 Biennial* violate *NCCB*'s equal protection holding because they treat newspaper owners somewhat differently than radio and television station owners. Again, these Petitioners misread *NCCB*. *NCCB* merely required the cross-ownership regulations reviewed below to treat newspaper and broadcast owners "in *essentially* the same fashion." 436 U.S. at 801 (emphasis added). As with the rules at issue in *NCCB*, the cross-ownership regulations treat newspaper and broadcast owners

essentially the same way in that all are restricted in their ability to own another type of local media. *See* Pet. App. 452a. Moreover, contrary to Media General's absolute statement that "a cable company may buy a broadcast station even where a newspaper may not," 04-1020 Pet. 24, a newspaper owner may receive a waiver of the rule to co-own a broadcast station in certain circumstances. Pet. App. 437a (*2002 Biennial* ¶481).

2. The court of appeals' decision not to apply heightened scrutiny to the cross-ownership regulations does not conflict with any decision of this Court. The *NCCB* Court did not apply heightened scrutiny in its disposal of the equal protection challenges, but rather found that content-neutral regulations that prevent any person from owning both a newspaper and a broadcast station are a "*reasonable means* of promoting the public interest in diversified mass communications." 436 U.S. at 802 (emphasis added).

Moreover, *NCCB*'s use of rational basis review is fully consistent with this Court's recent jurisprudence. Tribune and Cross-Petitioner Sinclair Broadcast Group, Inc. ("Sinclair") rely (04-1036 Pet. 21-22, 04-1177 Pet. 15) on *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994) ("*Turner I*") to argue that *any* regulation that distinguishes between classes of media outlets demands heightened scrutiny. However, this argument is directly precluded by *Turner I*'s admonition that "[i]t would be error to conclude . . . that the First Amendment mandates strict scrutiny for any speech regulation that applies to one medium (or a subset thereof) but not others." 512 U.S. at 660. *Turner I*'s touchstone for determining the level of scrutiny is the type of medium; "heightened scrutiny is unwarranted when the differential treatment is justified by some special characteristic of the particular medium being regulated." *Id.* at 660-61 (internal citations omitted). As the cross-ownership restrictions apply

to broadcast media, the "special characteristic" of spectrum scarcity makes heightened scrutiny unwarranted.

The other cases relied upon by Tribune (04-1036 Pet. 21-23; *see also* 04-1177 Cross-Pet. 15) are inapposite to the question of the proper standard of review of content-neutral broadcast regulations. *League of Women Voters* applied heightened scrutiny because the statute in question was a *content-based* speech restriction. 468 U.S. at 383.[8] *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575 (1983), considered the constitutionality of a tax imposed only on newspapers, and is directly analogous to *Grosjean v. American Press Co.*, 297 U.S. 233 (1936), which the *NCCB* Court held not to be controlling on the question of cross-ownership regulations, 436 U.S. at 801. Finally, the two court of appeals decisions cited by Tribune (04-1036 Pet. 22-23) concerned regulation of telephone companies, and both cases expressly recognized that broadcast ownership regulations receive a different and lower level of constitutional scrutiny.[9]

---

[8] *See also Fox Television Stations,* 280 F.3d at 1046 (rejecting heightened scrutiny because the rule at issue, "unlike the [rule] at issue in *League of Women Voters*, is not a content-based regulation; it is a regulation of industry structure, like the newspaper/broadcast cross-ownership rule the Court concluded was content-neutral in *NCCB*").

[9] Further, both cases were vacated by this Court. *US West, Inc. v. United States*, 48 F.3d 1092, 1098 (9th Cir. 1994), *vacated*, 516 U.S. 1155 (1996); *Chesapeake & Potomac Tel. Co. v. United States*, 42 F.3d 181, 191 (4th Cir. 1994), *vacated*, 516 U.S. 415 (1996) (per curiam).

C. The Court Below Did Not Address Whether Cross-Ownership Regulations Are Content-Based; Nor Have Petitioners Presented Compelling Reason To Revisit *NCCB*'s Holding That Such Regulations Are Content-Neutral

Media General's and Tribune's contention (04-1020 Pet. 26; 04-1036 Pet. 23) that the cross-ownership regulations should have been subjected to heightened scrutiny because they are content-based restrictions on speech likewise provides no basis for reconsidering *NCCB*. As a threshold matter, review of this argument is inappropriate because it was not addressed in the decision below. This Court "do[es] not decide in the first instance issues not decided below." *Nat'l Collegiate Athletic Ass'n v. Smith*, 525 U.S. 459, 470 (1999).

Certiorari is also unnecessary because this Court has already addressed the question, specifically holding that newspaper-broadcast cross-ownership regulations "are not content related." *NCCB*, 436 U.S. at 801. Lower courts have properly followed that decision, recognizing that cross-ownership rules are simply structural regulations that receive minimal constitutional scrutiny. *See, e.g.*, *American Family Ass'n*, 365 F.3d at 1169; *Ruggiero*, 317 F.3d at 244.

In any event, the court of appeals' decision that the structural cross-ownership regulations are not content-based is correct. As this Court has explained, "[t]he principal inquiry in determining content neutrality . . . is whether the government has adopted a regulation of speech because of disagreement with the message it conveys." *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989). The cross-ownership regulations were not at all motivated by the message of the speaker, but rather were developed to ensure a diversity of media voices was available to the public. Pet. App. 481a-482a (*2002 Biennial* ¶¶393-94). "[B]y placing a value upon diversity the FCC did not necessarily . . . value one speaker, or one type of speech over another; it merely

expressed its intention that there continue to be multiple speakers." *American Family Ass'n*, 365 F.3d at 1169 (internal quotations omitted).

The D.C. Circuit has held that analogous regulations of the structure of cable ownership that were motivated by diversity concerns were not content-based. In *Time Warner Entertainment Co. v. United States*, the court noted that "[a]s the Supreme Court made quite clear in *Turner I*, . . . making way for some speakers" in a context like broadcasting "where that necessarily means limiting the speech of others, is not inherently content-based." 211 F.3d 1313, 1317 (D.C. Cir. 2000). This same, traditional rationale clearly applies to the present regulations—rules restricting broadcast ownership to promote a diversity of media outlets are not subject to heightened First Amendment scrutiny.

D. Should The Court Wish To Reconsider Its Constitutional Precedent, Other Cases Offer A Better Opportunity For Fully Assessing The Issues

The *2002 Biennial* focused on specific ownership rules and not the factual underpinnings of the scarcity doctrine. Any reference to the continued existence of spectrum scarcity was an inconsequential piece of a massive record, and the factual basis for doctrine was not addressed on the merits by the FCC or the court of appeals. Re-examination of the scarcity doctrine would be a fact-intensive process. The present case plainly does not afford this Court a sufficient record or factual basis for such a task.

Moreover, as a practical matter, this case does not present an actual cross-ownership rule for constitutional review. Because the court below agreed with the FCC that the original newspaper-broadcast cross-ownership rule was no longer necessary, *see* Pet. App. 40a, there is no need to re-evaluate the constitutionality of that rule. On the other hand, since the court found that the replacement rule adopted by the FCC

was arbitrary and capricious and subject to further proceedings on remand, it would make no sense to evaluate the constitutionality of that rule at this time.

Further, the FCC has before it at least three licensing cases that squarely present the issue of whether the cross-ownership prohibition is constitutional. Specifically, Media General has filed license renewal applications asking the FCC to waive the newspaper-broadcast cross-ownership rule to allow it to continue to own both a daily newspaper and a television station in the Myrtle Beach-Florence, South Carolina, Panama City, Florida, and Columbus, Georgia DMAs.[10] In making its waiver requests, Media General argues that spectrum scarcity no longer exists and thus the cross-ownership rules are unconstitutional. *See, e.g.* Application for Renewal of Broadcast Station License for WBTW, Media General Opposition to Petition to Deny 39-44 (Dec. 14, 2004). Because these cases present the issue in specific, concrete factual settings, yet do not raise the wide variety of issues presented in the *2002 Biennial*, any one would present a better vehicle for revisiting the constitutional issues raised by Petitioners in this case, should this Court be inclined to do so.

II. THERE IS NO CONFLICT OVER THE INTERPRETATION OF §202(h) OF THE 1996 TELECOMMUNICATIONS ACT

Petitioner National Association of Broadcasters ("NAB"), along with Tribune, NAA, and Respondent Clear Channel Communications, Inc. ("Clear Channel")[11] assert there is a

---

[10] Application for Renewal of Broadcast Station License for WBTW, FCC File No. BRCT-20040802BIK (Aug. 6, 2004), Application for Renewal of Broadcast Station License for WMBB, FCC File No. BRCT-20041001AQF (Oct. 7, 2004), Application for Renewal of Broadcast Station License for WRBL, FCC File No. BRCT-20041210BZP (Dec. 8, 2004).

[11] Clear Channel is a Respondent in 04-1033.

circuit split with respect to the FCC's construction of §202(h) of the 1996 Act. This is not so. All three members of the panel agreed that the court of appeals' construction is consistent with that of the D.C. Circuit. Their ruling that the periodic review mandated by §202(h) should employ the normal arbitrary and capricious test generally required by the Administrative Procedure Act is clearly correct and should not be disturbed. Nor is there reason for this Court to examine the court of appeals' unanimous conclusion that §202(h) allows the FCC to adopt stronger rules at the conclusion of the review process.

Although each of the petitioners emphasize the deregulatory thrust of the 1996 Act, there is no suggestion that the ruling below conflicts with any other circuit on this point. *See* Pet. App. 34a (majority noting that 1996 Act is deregulatory); Pet. App 122a (concurring judge noting the "deregulatory flavor" of the 1996 Act). Nor do any of the Petitioners point to express language in any statute that prohibits the FCC from increasing its regulatory oversight when the record justifies such action. Under this Court's jurisprudence, the FCC is entitled to deference in construction of statutory ambiguities such as this, *see, e.g.*, *United States v. Mead Corp.*, 533 U.S. 218, 229 (2001), and the petitions surely do not raise an issue here that would support issuance of a writ of certiorari.

1. Tribune, NAA, Sinclair, and Clear Channel argue that the Third Circuit's holding that §202(h) does not impose a more exacting standard of review is in conflict with that of the D.C. Circuit. *See* 04-1036 Pet. 24-26; 04-1045 Pet. 19-23; 04-1177 Cross-Pet. 11-12; Clear Channel Br. 24-27. These arguments mischaracterize the sequence in which the FCC and the D.C. Circuit acted and downplay the D.C. Circuit's definitive decision in *Cellco Partnership v. FCC*, 357 F.3d 88 (D.C. Cir. 2004). As the Third Circuit joined *Cellco*

in holding that the phrase "necessary in the public interest" [12] did not create a deregulatory presumption, and "endorsing the [FCC]'s view that 'necessary' must mean the same thing in the periodic review context as in the rulemaking context," Pet. App. 31a, there is no conflict.[13]

Clear Channel's quotations of fragments from *Cellco* are misleadingly incomplete, as can be seen by reference to the complete passages from which Clear Channel quotes. For example, Clear Channel claims that *Cellco*, "expressly extended to Section 11 the 'presumption in favor of repealing or modifying covered rules' that the D.C. Circuit had found inherent in Section 202(h)." Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 97). What *Cellco* actually said was that "the [FCC] agreed that *where §11's conditions are met*, §11 creates a presumption in favor of repealing or modifying" the

---

[12] The provision directly at issue in *Cellco* was §11 of the 1996 Act, a biennial review provision that, just like §202(h), requires the FCC to repeal or modify regulations no longer "necessary in the public interest."

[13] Petitioners rely on the D.C. Circuit's pre-*Cellco* decisions in *Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027 (D.C. Cir. 2002) ("*Fox I*"), and *Sinclair v. FCC*, 284 F.3d 148 (D.C. Cir. 2002) ("*Sinclair*"). However, the D.C. Circuit later modified the *Fox I* decision to "leave unresolved precisely what §202(h) means." *Fox Television Stations, Inc. v. FCC*, 293 F.3d 537, 540 (D.C. Cir. 2002) ("*Fox II*"). Moreover, *Cellco* explicitly discussed and harmonized its ruling with those in *Fox I*, *Fox II* and *Sinclair*. 357 F.3d at 97-98. The *Cellco* panel pointed out that "shortly after *Sinclair* was decided, the court in [*Fox II*] retracted *Fox I*'s definition of 'necessary'" and that "the court in *Sinclair* did not adopt a general presumption in favor of modification or elimination of regulations." 357 F.3d at 98. Thus, for example, when NAB refers (04-1033 Pet. 22, *see also* 04-1036 Pet. 24, 04-1045 Pet. 19) to *Fox I* and *Sinclair* as imposing "a presumption in favor of repealing or modifying the ownership rules," it ignores the subsequent *Cellco*, ruling, which specifically stated that "neither *Fox I* nor *Sinclair* adopted a controlling definition of 'necessary,' much less the position that §11 embodies a presumption in favor of deregulation." 357 F.3d at 98. Importantly, the *2002 Biennial*, which purports to rely on *Fox I* and *Sinclair*, Pet. App. 215a (*2002 Biennial* ¶11), was issued prior to the *Cellco* decision.

rules. 357 F.3d at 97 (emphasis added). Indeed, there is no dispute within or among the circuits that when a regulation is found no longer to be in the public interest that there is a presumption in favor of repeal or modification. *See id.* at 99. Similarly, although Clear Channel claims that *Cellco* imposes obligations that go "beyond [the FCC's] normal monitoring responsibilities," Clear Channel Br. at 26 (quoting *Cellco*, 357 F.3d at 99), the decision's preceding sentence makes clear that the *Cellco* court was referring to remedies, not the threshold test. 357 F.3d at 99 ("The [FCC] reasonably concluded that the deregulatory presumption arises only after it has determined under §11(a) that a regulation is no longer necessary in the public interest.").

2. NAB, supported by Clear Channel, presents a second statutory argument, claiming that the deregulatory goals of the 1996 Act permit the FCC only to deregulate and precludes it from ever tightening its radio ownership regulations at the conclusion of a biennial review. 04-1033 Pet. 19-26; Clear Channel Br. 20-24. There is no suggestion of a circuit conflict on this point, and no specific statutory provision governs this question. This, then, is also an issue as to which the FCC is entitled to substantial deference. *See, e.g.,. Mead,* 533 U.S. at 229.

NAB argues (04-1033 Pet. 22) that "Sections 202(b) and 202(h) together express a clear directive that local ownership restrictions not be tightened," but none of the language it cites from the statute or the D.C. Circuit's *Fox* and *Sinclair* decisions addresses the particular issue presented here. To say that "Congress set in motion a process to deregulate the structure of the broadcast and cable industries," 04-1033 Pet. 22 (quoting *Fox I*, 280 F.3d at 1033), is not inconsistent with an agency determination that the deregulatory process can be accomplished with one step backward and three steps forward.

Both NAB and Clear Channel likewise maintain that the phrase "repeal or modify" must be read so that "modify" means only "that the [FCC] can relax existing restrictions; it does not authorize the [FCC] to tighten them." 04-1033 Pet. 23; *see also* Clear Channel Br. 20, and that the court of appeals ruling "conflicts with the text and structure of Section 202 as a whole." Clear Channel Br. 21. There is no basis to disturb the court of appeals' holding on this point. As the panel majority reasonably explained, the deregulatory goal of §202(h) is fulfilled by "requir[ing] the [FCC] periodically to justify its existing regulations, an obligation it would not otherwise have." Pet. App. 34a. *See also id.* at 124a ("Despite §202(h)'s admittedly deregulatory tenor, the statute does not foreclose the possibility of increased regulation under the biennial review if the [FCC] finds such action in the public interest.") (Scirica, C.J., concurring in part and dissenting in part). There is nothing important or novel about this garden variety question of statutory construction, or the resolution of it below, much less anything which would rise to the level of significance to merit this Court's attention.

III. ROUTINE APPLICATION OF WELL-SETTLED ADMINISTRATIVE LAW STANDARDS DOES NOT MERIT THIS COURT'S INTERVENTION

1. Both NAA and the Government's Conditional Cross-Petition contend (04-1045 Pet. 23-25; 04-1168 Cross-Pet. 21-28) that the court of appeals did not afford sufficient deference to the FCC's decisionmaking.[14] Yet neither claims that

---

[14] The deference claim is not raised by other industry Petitioners. Like Public Interest Respondents, many industry Petitioners argued to the court below that certain FCC decisions were arbitrary and capricious. *See* Pet. App. 52a (industry petitioners argued exclusion of cable but inclusion of internet in diversity index arbitrary and capricious); 58a (industry petitioners argued "equal market shares" assumption arbitrary and capricious); 103a (industry petitioners argued specific local radio limits arbitrary and capricious).

the court failed to articulate the correct deference standards. *See* 04-1045 Pet. 24; 04-1168 Cross-Pet. 23, 27. Indeed, the court below correctly noted that its scope of review was narrow, Pet. App. 25a, that it was not to substitute its judgment for that of the agency, *id.*, and that "[d]eference to the [FCC]'s judgment is highest when assessing the rationality of the agency's line-drawing endeavors," *id.* at 62a. The court remanded only when the agency's decision was "not supported by substantial evidence." *Id.* at 25a. Importantly, there was no disagreement between the majority and Chief Judge Scirica about the proper legal standards, *compare id.* at 24a-26a, *with id.* at 116a-118a; the only disagreement was over the application of those standards to specific rules at issue. At bottom, NAA and the Government simply quarrel over this application of law to fact. That issue does not merit review. Sup. Ct. R. 10.

2. Notwithstanding the fact that this issue does not warrant intervention by this Court, the court of appeals' decision to remand certain rules was correct. The Government claims (04-1168 Cross-Pet. 21) that the court of appeals should have deferred to the FCC's decision to assume equal market shares for outlets within the same media. The flaw in this argument, as the court observed, is that this equal market share assumption conflicted with other parts of the *2002 Biennial*, where the FCC expressly found that there was "no reason to believe that all media are of equal importance." Pet. App. 59a (quoting *2002 Biennial* ¶409). The court correctly pointed out that "the assignment of equal market shares generates absurd results," such as the Dutchess Community College television station receiving a market share *equal to* New York City's ABC affiliate and *higher than* the *New York Times*. Pet. App. 59a. In sum, the court found that "assuming equal market shares [is] unrealistic and inconsistent with the [FCC]'s overall approach . . . and proffered rationale," and thus it properly remanded that decision. *Id.* at 61a.

The Government also questions (04-1168 Cross-Pet. 24) the deference given to the FCC's decision to give substantial weight to the internet in the FCC's Diversity Index. Once again, however, the court appropriately remanded in light of the FCC's failure to explain obvious inconsistencies. The court correctly noted that the FCC's rationale for excluding cable television from the Diversity Index also necessarily applied to the internet. *See* Pet. App. 52a-58a. For example, while the FCC discounted cable where a survey suggesting that cable was a source of local news conflicted with other record evidence, the FCC failed to discount the internet under analogous circumstances. *Id.* at 55a.[15] Because the similarities between cable television and the internet required consistent treatment, the court properly found that the "decision to count the Internet as a source of viewpoint diversity, while discounting cable, was irrational." *Id.* at 52a.

Finally, the Government challenges (04-1168 Cross-Pet. 27-28) the court of appeals' review of specific limits chosen regarding cross-media and local radio station ownership. But in fact the court *upheld* many of the FCC's line-drawing decisions, *see id.* at 75a (upholding "top-four restriction" on local TV ownership), 85a (upholding local radio market definition), only remanding those that were marred by inconsistencies. For example, the specific limits created by the FCC, purportedly developed to prevent "problematic levels of concentration," *id.* at 509a (*2002 Biennial* ¶435), would have allowed certain media combinations resulting in considerably higher concentration levels than others that were prohibited. The court correctly held that "[t]he [FCC]'s failure to provide any explanation for this glaring inconsistency is without a

---

[15] Further, the court noted that the FCC's attempt to justify the differential treatment by arguing that local cable news is not available to everyone while the internet is was inconsistent with the FCC's recognition (elsewhere in the *2002 Biennial*) that nearly one-third of Americans have no internet access. Pet. App. at 57a-58a.

doubt arbitrary and capricious." *Id.* at 63a. Thus, while the court properly engaged in highly deferential review of specific limits chosen by the FCC, it did not abdicate its responsibility to remand when the lines drawn were not supported by the record and therefore "patently unreasonable." *Sinclair*, 284 F.3d at 162.[16]

It is a truism that this Court is "'[a] court of law . . . rather than a court for correction of errors in fact finding.'" *Missouri v. Jenkins*, 515 U.S. 70, 162 (1995) (Souter, J., dissenting) (quoting *Graver Tank & Mfg. Co. v. Linde Air Prod. Co.*, 336 U.S. 271, 275 (1949)). As the decision below rests upon a correct understanding of this Court's principles of administrative deference, Petitioners' contention is simply that the court of appeals misapplied the law to the facts of this case. As explained above, that case-specific issue does not merit this Court's attention.

---

[16] The Government also challenges (04-1168 Pet. 27-28) the remand of the FCC's specific local radio ownership limits. Once again, the court of appeals remanded these limits because of the irrational and inconsistent manner in which they were developed. For example, the court pointed out that the FCC failed to explain why it ignored the DOJ/FTC Merger Guidelines in developing the local radio limits, but expressly relied on the Guidelines in developing analogous local television ownership limits. Pet. App 103a. Further, while the rationale for the local radio ownership limits depended heavily on the theory that a certain number of equal-sized competitors would make a market competitive, the court correctly noted that "record evidence supports neither actual nor potential existence of equal-sized competitors" in the local radio market. *Id.*

CONCLUSION

For the foregoing reasons, this Court should deny the petitions for a writ of certiorari.

Respectfully submitted,

ANGELA J. CAMPBELL
KAREN HENEIN
INSTITUTE FOR PUBLIC REPRESENTATION
GEORGETOWN UNIVERSITY LAW CENTER
600 New Jersey Ave., NW
Suite 312
Washington, DC 20001
(202) 662-9535

DAVID HONIG
NICOLAINE LAZARRE
MINORITY MEDIA & TELECOMMUNICATIONS COUNCIL
3636 16th St. NW, #B-366
Washington, DC, 20010
(202) 332-7005

ANDREW JAY SCHWARTZMAN*
MEDIA ACCESS PROJECT
Suite 1000
1625 K Street, NW
Washington, DC 20006
(202) 232-4300

GLENN B. MANISHIN
KELLEY DRYE & WARREN, LLP
8000 Towers Crescent Drive,
Suite 1200
Vienna, VA 22812
(703) 918-2322

SHELBY D. GREEN
PACE UNIVERSITY SCHOOL OF LAW
78 No. Broadway
White Plains, NY 10603
(914) 422-4421

* Counsel of Record

May 2, 2005

5

No. 04-1033

Supreme Court, U.S.
FILED
MAY 16 2005
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

NATIONAL ASSOCIATION OF BROADCASTERS,
Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

REPLY BRIEF OF THE NATIONAL ASSOCIATION OF BROADCASTERS

MARSHA J. MACBRIDE
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

DONALD B. VERRILLI, JR.*
IAN HEATH GERSHENGORN
ELAINE J. GOLDENBERG
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

* *Counsel of Record*

May 16, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. This Court Should Review The Issues Raised In NAB's Petition Now 1

II. The Local Radio And Local Television Ownership Restrictions At Issue Violate Section 202 Of The 1996 Act 5

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Cellco Partnership v. FCC, 357 F.3d 88 (D.C. Cir. 2004) 10

FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120 (2000) 6

Federal Power Commission v. Conway Corp., 426 U.S. 271 (1976) 4

Fox Television Stations, Inc. v. FCC, 280 F.3d 1027 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002) 3, 7, 8, 9, 10

Fox Television Stations, Inc. v. FCC, 293 F.3d 537 (D.C. Cir. 2002) 10

Hohn v. United States, 524 U.S. 236 (1998) 9

MCI Telecommunications Corp. v. America Telephone & Telegraph Co., 512 U.S. 218 (1994) 6

Sinclair Broadcast Group, Inc. v. FCC, 284 F.3d 148 (D.C. Cir. 2002) 2, 3, 8

United States v. General Motors Corp., 323 U.S. 373 (1945) 4

STATUTES

Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56

§ 202(a) 6

§ 202(c)(2) 6

§ 202(h) 6

LEGISLATIVE MATERIAL

H. Rep. No. 104-204(I) (1995), *reprinted in* 1996 U.S.C.C.A.N. 10 6

NAB's petition challenges two aspects of the decision below: first, the Third Circuit's approval of changes to the FCC's local radio rules that forbid the common ownership and transfer of stations that would be permissible under the ownership levels established by Congress in the Telecommunications Act of 1996; and second, the decision to uphold the FCC's retention of a "top-4" television duopoly restriction, which forbids or sharply limits common ownership in many local television markets, including small and medium-sized markets where the benefits of common ownership are most needed. The arguments in the oppositions filed by the Commission and the "public interest respondents" are, with respect to the issues raised by NAB, irrelevant, erroneous, or both. NAB's petition thus warrants immediate review.[1]

I. This Court Should Review The Issues Raised In NAB's Petition Now.

Both the Commission and the public interest respondents contend that this case is in an "interlocutory posture" and that review by this Court would thus be "premature." FCC Opp. 12, 14-15; Pub. Int. Resp. Opp. 2. Those arguments have no application whatsoever to NAB's petition.

As an initial matter, each of the FCC rules that NAB challenges is fully in effect and ripe for review. The Third Circuit granted the FCC's request to allow the Commission's new local radio ownership rules to take immediate effect, and the Commission has been enforcing them ever since. After requesting and receiving this relief, the Commission can hardly be heard to contend now that review should be

---

[1] Many of the same arguments raised by respondents were also set forth in the FCC's conditional cross-petition for a writ of certiorari (04-1168), and are thus also addressed in NAB's May 2, 2005 response to that conditional cross-petition.

delayed because the Third Circuit's ruling is interlocutory in this regard.

The top-4 restriction on common ownership of local television stations is also fully in effect. The Third Circuit's stay required the FCC to reinstate its "old" local television rule adopted in 1999, which contained the same prohibition on common ownership of top-4 stations. That old rule is the same one that the D.C. Circuit in *Sinclair* found arbitrary and capricious. *See Sinclair Broadcast Group, Inc. v. FCC*, 284 F.3d 148, 155, 169 (D.C. Cir. 2002). Further delay in reviewing the FCC's top-4 restriction thus preserves a rule that was found to be arbitrary and capricious three years ago.

The public interest respondents (but not the FCC) assert generally that review is nevertheless premature because the "rules challenged by Petitioners are not expected to be retained on remand." Pub. Int. Resp. Opp. 2. But the remand ordered by the Third Circuit is unlikely to affect the rules NAB challenges here. With respect to the FCC's new method of defining radio markets, its treatment of Joint Sales Agreements, and its local radio transferability restrictions, for example, the Third Circuit blessed the FCC's decisions, *see* Pet. App. 85a-90a; 91a-99a, and the Commission expressly sought and received authority to implement them immediately. The suggestion that any of these radio provisions will be altered on remand is therefore not credible, especially because the Third Circuit has taken the extraordinary step of retaining jurisdiction over the FCC's order on remand.

The same is true for the top-4 local television ownership restriction. The Commission reimposed the top-4 restriction after the D.C. Circuit in *Sinclair* remanded a television duopoly rule that contained the very same provision. *See Sinclair*, 284 F.3d at 152, 155. The Commission thus plainly believes that the top-4 constraint is appropriate regardless of what other limits are placed on the common ownership of

local television stations, and the Third Circuit's approval of the top-4 restriction will only harden the FCC's resolve.

Even apart from the specific status of the rules NAB challenges, respondents are wrong to suggest that resolving the meaning of § 202 of the 1996 Act is "premature." Congress passed the 1996 Act to relax the ownership restrictions that have a profound effect on the American public and the multibillion dollar media industry that serves them. Yet today, nearly a decade later, the basic standards that govern the Commission's ownership review proceedings remain unclear, and the FCC has yet to conduct a review that survived judicial scrutiny. *See Fox Television Stations, Inc. v. FCC*, 280 F.3d 1027, 1033 (D.C. Cir.), *modified on reh'g*, 293 F.3d 537 (D.C. Cir. 2002); *Sinclair*, 284 F.3d at 169; Pet. App. 11a-12a.

Moreover, as further discussed below, the Third Circuit and the D.C. Circuit have reached different conclusions about the meaning of § 202. The D.C. Circuit has vacated or remanded the FCC's revisions of the ownership rules as insufficiently deregulatory to satisfy Congress's directives in § 202. In sharp contrast, the Third Circuit views the Commission's subsequent efforts as overly deregulatory. Broadcasters, listeners, and viewers suffer the consequences of the resulting uncertainty. Common ownership that the Commission itself acknowledges would be beneficial to broadcasters and would improve service to the public is deterred or entirely precluded. In addition, the propriety of investments worth millions or even hundreds of millions of dollars is left uncertain – especially in light of the transfer restrictions that the FCC has placed on station combinations that were proper under the local radio ownership levels that Congress itself established in the 1996 Act.

That the Commission will soon be reviewing its ownership rules again is likewise no reason to delay review. *See* Pub. Int. Resp. Opp. 2. Quite the contrary. The next

mandatory review is in 2006, and the Commission will likely begin preparing for that review later this year. It is precisely because the Commission must undertake these regular reviews that this Court's review is urgent. Without certainty about the basic standard to be applied under § 202, future review proceedings – including the remand proceedings from the Third Circuit's decision here – will be an enormous waste of time and energy, and will fail to carry out Congress's directives or achieve the deregulatory benefits that Congress anticipated. *See, e.g.*, *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 275-76 (1976) (noting that "[t]he case was . . . remanded to the Commission for further proceedings" but that the Court granted certiorari "to consider the question whether the Court of Appeals had correctly construed the statutes controlling the Commission's jurisdiction"); *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945) ("The cause was remanded for trial in accordance with the ruling of the Circuit Court of Appeals. We think we should review that ruling inasmuch as it is fundamental to the further conduct of the case.").

In short, it is vital for this Court to clarify the meaning of § 202 now – and the order at issue is a perfect vehicle for doing so. Tremendous resources were poured into the most recent biennial proceeding, not only by the Commission but by all segments of the industry and by thousands of individuals. An extensive record was developed, and all interested parties had the chance to place in that record the facts they found most persuasive. The Commission issued a lengthy decision giving extensive consideration to all of the issues. The questions presented in NAB's petition are thus indisputably ripe for review.

II. The Local Radio And Local Television Ownership Restrictions At Issue Violate Section 202 Of The 1996 Act.

On the merits, the Third Circuit's unwillingness to abide by the directives of Congress in the 1996 Act fully warrants this Court's attention, particularly in light of the contrary approach taken by the D.C. Circuit.

1. The FCC's opposition highlights the need for immediate review. In the Commission's view – endorsed by the Third Circuit – the 1996 Act placed *no constraints at all* on the Commission's authority to regulate broadcast media ownership. According to the FCC, "Section 202(h) *does not impair* the Commission's authority to adopt and revise its ownership rules," FCC Opp. 24 (emphasis added), and "Congress's decision to set the permissible levels of common ownership" in § 202 "*does not constrain* the FCC's authority to regulate broadcast ownership in the public interest." FCC Opp. 25 (emphasis added).

That position is untenable. Section 202 of the 1996 Act unambiguously reflects a deregulatory mandate from Congress. *See, e.g.*, NAB Pet. 2-3. Virtually every subsection of § 202 reverses FCC ownership restrictions (including many that had been in place for decades) in an effort to *expand* common ownership and realize the benefits of competition. Indeed, § 202 was an extraordinary provision, as Congress specified in unusual detail the increased level of common ownership it wanted to permit for numerous local and national broadcast markets.

Accordingly, the FCC's contention that "'Congress gave no express indication [in the 1996 Act] that it intended to restrict the Commission's rulemaking authority," FCC Opp. 24 (quoting Pet. App. 34a n.18), is incorrect. The precise point of § 202 was to change how the FCC had been exercising its broadcast ownership authority, and to redirect

the Commission's efforts away from regulation and toward competition. *See, e.g.*, H. Rep. No. 104-204(I), at 118 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 86 (noting that "market developments require substantial deregulation of local station ownership" and that "[p]ermitting common ownership of stations will promote the public interest").

The Commission seeks refuge in the word "modify" in § 202(h). In the Commission's view, "Congress's use of the term 'modify,' in conjunction with the continued emphasis on the 'public interest' in Section 202(h)," makes clear that § 202 effectuates no "drastic reduction in the scope of the FCC's traditional licensing authority." FCC Opp. 25.

Such a reading not only renders § 202(h) superfluous, it ignores the rest of § 202, which is unambiguously deregulatory and reflects dissatisfaction with the FCC's determination of the public interest in the context of media ownership. *See, e.g.*, *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (words of a statute "must be read . . . with a view to their place in the overall statutory scheme"); *see also* NAB Pet. 22. Moreover, if the FCC were correct that "modify" permitted it to increase regulation beyond the levels specified in the 1996 Act, then under § 202(h) the Commission could have immediately restored the national radio ownership cap that § 202(a) abolished, and could have interpreted Congress's directive in § 202(c)(2) to determine whether to "retain, modify, or eliminate" local television rules as an authorization to immediately impose even stricter limitations rather than to steer some middle course between retention and elimination. This is not a viable interpretation of § 202, which plainly sought further deregulation, not the status quo or more restrictive regulation. *Cf. MCI Telecomms. Corp. v. American Tel. & Tel. Co.*, 512 U.S. 218, 228-29 (1994) (rejecting the FCC's plea for deference in defining the term "modify" to advance its own goals in the face of contrary policies adopted by Congress).

It is thus no surprise that the D.C. Circuit has adopted a view of the statute that is directly contrary to that adopted by the Third Circuit and advanced by the Commission here. *See* NAB Pet. 22-25, 28-29; *see also* Tribune Co. Pet. 24 (04-1036); NAA Pet. 23 (04-1045). According to the D.C. Circuit, § 202(h) embodies a "mandate" akin to "Farragut's order at the battle of Mobile Bay ('Damn the torpedoes! Full speed ahead.')." *Fox*, 280 F.3d at 1044. Applying that deregulatory mandate, the D.C. Circuit has vacated or remanded all of the ownership restrictions it has reviewed. *See infra* p. 3. The D.C. Circuit has plainly rejected the view – adopted by the Third Circuit and the FCC – that Congress's mandate in the 1996 Act was one of "business as usual."[2]

2. The misreading of § 202 adopted by the Third Circuit and defended by the Commission here merits this Court's attention. Review of media ownership rules is among the most significant tasks that the Commission carries out, as is clear from both the scope and the level of industry and public participation in the FCC proceedings below. The proper application of § 202 to the Commission's local radio and local television rules is therefore an important issue that is worthy of review even in the absence of a circuit split. *See* NAB Pet. 16-17 (describing Court's history of granting certiorari even in the absence of a split to review FCC orders involving media ownership and implementation of the 1996 Act).

Here, however, review is even more appropriate because there is a conflict between the Circuits on the meaning of

---

[2] Notably, the FCC attacks a straw man in suggesting that NAB contends that the Commission can *never* restrict ownership in its § 202(h) review. To the contrary, NAB's position is that § 202(h) embodies a deregulatory mandate that requires the Commission to have a particularly strong justification for further restricting ownership, and that precludes the Commission from imposing ownership restrictions that are more restrictive than those imposed explicitly by Congress in the 1996 Act.

§ 202. Respondents counter that the Third Circuit and the D.C. Circuit applied "essentially the same standard." FCC Opp. 26; *see also* Pub. Int. Resp. Opp. 18. But no reader of *Fox*, *Sinclair*, and the decision below could reasonably come away with the impression that the D.C. Circuit and the Third Circuit applied "essentially the same standard." In *Fox* and *Sinclair*, the D.C. Circuit rigorously applied the 1996 Act's deregulatory mandate to the Commission's ownership rules, striking down or remanding each of the challenged provisions on the ground that the Commission had failed to adequately explain why further deregulation was not warranted.[3]

The Third Circuit took the opposite approach, analyzing the FCC's ownership rules to ensure that they were not too deregulatory and insisting on additional justification for even slightly deregulatory measures such as the modest loosening of the numerical restrictions on common ownership of local television stations. Pet. App. 78a-79a. Indeed, the Third Circuit chastised the Commission for deciding to retain numerical radio station ownership limits established by Congress in the 1996 Act, a decision that was apparently insufficiently *re*-regulatory, and it upheld other measures that were more restrictive of common ownership than the levels expressly set in the Act. *See* Pet. App. 85a (noting that "[t]he Commission is free to regulate or deregulate as long as its regulations are in the public interest and are supported by a reasoned analysis"); *see generally id.* at 85a-90a, 102a-106a.

To be sure, the Third Circuit paid lip service to the idea that § 202 is "deregulatory," *see* Pet. App. 34a-35a, but drained that term of all meaning. Indeed, by interpreting § 202(h) – a centerpiece of the 1996 Act's reform – as

---

[3] The court's statements in this regard were about more than just the appropriate remedy once § 202(h) was triggered; they were about determining the meaning of § 202(h) itself. *See, e.g.*, *Fox*, 280 F.3d at 1040-45, 1049-52; *Sinclair*, 284 F.3d at 159, 162-65.

nothing more than a restatement of the Commission's underlying administrative law obligations, the Third Circuit effectively read that section out of existence, in sharp contrast to the approach taken by the D.C. Circuit. *See, e.g.*, *Hohn v. United States*, 524 U.S. 236, 249 (1998) (avoiding a construction that would make a statutory provision "superfluous").

Respondents' attempt to downplay the deregulatory approach of the D.C. Circuit is unavailing.[4] The FCC claims, for example, that *Fox* stands for the propositions that "'nothing in § 202(h) signals a departure from [the] historic scope' of the Commission's public interest authority," and that section 202 "'determined only the starting point from which the Commission was to assess the need for further change.'" FCC Opp. 4, 25 (quoting *Fox*, 280 F.3d at 1043 & 1047 (alteration in original)). But the *Fox* court's reference to the "historic scope" of the Commission's role merely reaffirmed that the phrase "public interest" embraces "diversity (as well as localism)" – it says nothing about the degree to which the provision mandates deregulation. *Fox*, 280 F.3d at 1042. And the "starting point" to which the *Fox* court referred – a reference made in the context of a challenge to the Commission's failure to loosen or eliminate a television audience reach limitation that Congress had already relaxed from 25% to 35% -- was one for further deregulation, not for tightening regulations that Congress had explicitly made less onerous. *See id.* at 1033. Indeed, in *Fox* the D.C. Circuit invalidated the Commission's decision to *retain* the rules at issue in that case; any Commission

[4] At the time this case was filed, the public interest respondents clearly understood the deregulatory nature of *Fox* and *Sinclair*, and they sought to avoid review by the D.C. Circuit at all costs. They filed virtually identical petitions for review in the Second, Third, and Ninth Circuits, and then opposed the efforts of the FCC and the media petitioners to transfer the case to the D.C. Circuit, despite the fact that the FCC's order was in part a response to the D.C. Circuit's remands in *Sinclair* and *Fox*.

decision to impose even stricter ownership regulations (such as the radio rules approved by the Commission here) would have been rejected *a fortiori*.

Similarly meritless are respondents' protestations that the D.C. Circuit's later decision in *Cellco* overturned *Fox*. *Cellco* – which involved section 11 of the 1996 Act – addressed principally whether "necessary" in the phrase "necessary in the public interest" means "indispensable" to the public interest or merely "consonant with" it, concluding that the latter meaning is appropriate. *See Cellco P'ship v. FCC*, 357 F.3d 88, 97-98 (D.C. Cir. 2004). But the meaning of "necessary" is not controlling of the broader question of whether § 202(h) and the rest of § 202 embody a deregulatory mandate. *See, e.g.*, *Fox*, 280 F.3d at 1033, 1036, 1043-44, 1048. Section 202(h) can be deregulatory even if "necessary" does not mean indispensable.

Indeed, that is exactly what the *Fox* court held. In the decision on rehearing, the *Fox* court expressly left open the meaning of "necessary," but left in place the remainder of the initial *Fox* opinion, including the analogy of § 202(h) to "Farragut's order."[5] The D.C. Circuit's resolution of the question left open in *Fox* cannot be read to overturn the conclusion of the *Fox* court that § 202(h) and the remainder of § 202 embody precisely the deregulatory mandate that the Third Circuit and the FCC deny.

CONCLUSION

The petition for writ of certiorari should be granted.

---

[5] The court's modification of *Fox* on rehearing, *see* Pub. Int. Resp. Opp. 19 n.13, involved only the single paragraph discussing the meaning of the word "necessary" in section 202(h) and two minor conforming changes. *See Fox*, 293 F.3d at 541 (describing amendments to initial opinion). The rest of the initial opinion remained untouched. *See id.*

Respectfully submitted,

MARSHA J. MACBRIDE
JERIANNE TIMMERMAN
NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, N.W.
Washington, DC 20036
(202) 429-5430

DONALD B. VERRILLI, JR.*
IAN HEATH GERSHENGORN
ELAINE J. GOLDENBERG
JENNER & BLOCK LLP
601 Thirteenth Street, N.W.
Washington, DC 20005
(202) 639-6000

**Counsel of Record*

May 16, 2005